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LEGAL THOUGHT IN THE LATE NINETEENTH CENTURY

Introduction

Our major interest is constitutional thought, but we begin by considering legal thought generally, including a short look at legal education - and we shall begin the other two parts in the same way. There are four readings: i) a note about law and legal reasoning, which is intended to be an introduction; ii) the inaugural address of the principal of Osgoode Hall, given in 1882; iii) large chunks from Dicey's *The Law of the Constitution*; and iv) a book review by David Sugarman.

Beliefs About Law and Legal Reasoning

During the second half of the century, a widely shared way of thinking about such topics as the nature and proper functions of legislatures and courts, and the appropriate materials and ways of legal reasoning became dominant among lawyers in England, the United States, and Canada. For England and Canada, this way of thinking was expressed primarily by scholars, especially a small group at Oxford that included William Anson, Albert Venn Dicey, William Markby, and Frederick Pollock. Its basic elements were the equality and autonomy of individuals (and legal entities generally), a division between the public and private realms, and the paramountcy of the common law and the courts. Legal reasoning was distinctive, and sharply separated from politics and context. Of course, this description is a model, and even as a model, it is greatly simplified. The minds of individual lawyers were much more complex and muddled, and included inconsistent elements, and there were differences among individuals and between generations, and between practising lawyers and the profession.

It is useful to continue here with an account of the beliefs about the common law, for it was the core of these lawyers' thought and their legal world. We shall look at Canadian lawyers. They wrote very little about the general nature of the common law, either by way of description or critical inquiry, so the major source must be the brief, fragmentary comments in book reviews and editorials in the law journals. The tone of this writing, and perhaps its very scarcity, suggest that these beliefs were untroubled and widespread. Throughout, it demonstrated an immense pride in an ancient body of law and procedures, which had given justice and liberty for centuries to the English people, and continuously adapted itself to their changing needs.

A collage of the beliefs emerges from these fragments. The basic elements of the common law were its principles - the "pillars that support the building." For example, at the opening ceremonies for the revitalized Osgoode Hall law school, the new principle, Reeve, spoke of "the great fundamental principles of Law" (he meant the common law), and declared that the chief function of the school was "the cultivation of the right understanding of legal principles," for the purpose of applying these principles to the manifold problems of clients. These principles, or at least the major ones, had changed in response to the changing needs of their society, albeit slowly, and more in the distant past than recently. In

deciding individual cases, judges reasoned from these principles, and applied them to the particular facts before them, and once decided, the cases became both applications and illustrations of the principles. As well, decided cases were precedents that future courts were obligated to follow. In reasoning in this way, the only permitted materials were the principles and the cases. A judge might, perhaps, be influenced by personal values or some element of the social context, but this was simply a mistake - as though a sign in a mathematical calculation had been ignored or misread. The role of the judges was objective and apolitical; they had no discretion, or, whatever discretion they had must be exercised according to law. This common law was often and with pride called a science, although term seemed to have little bite, meaning little more than functional organization and internal coherence of doctrine, and sometimes a contrast to practical or day-to-day practice.

This collage contained uncertainties and tensions. What was the nature of the principles? Doubtless, they were they general guides, such as "sic utere tuo ...", but were they firm rules as well, such as the detailed doctrines about interests property? Where did they come from? The usual belief or working assumption was that they were derived from the decided cases. But was the process of making principles and deciding cases simply circular: were the principles were derived from cases, and the cases were decided by applying the principles. If individual cases were binding, should a judge follow the case or an inconsistent principle? And change how could law change and how could it embody values, such as liberty and bodily security, if the decided cases alone and were the sources of the principles and must determine the results of disputes?

Some of these questions, for example, the nature of change and the role of judges, were manifestation of grand questions that had endured for centuries. More important for our purposes, some were caused by changes in legal thought in England to which Canadian lawyers were unhesitatingly faithful. During the nineteenth century, especially in its second half, positivism became the dominant jurisprudence, together with a tendency to think of the common law as a set of rules rather than a set of procedures for deciding individual disputes by drawing on the collected wisdom of the community. At the same time individual cases became binding, and analysis of cases crowded out other considerations. In thinking about doctrine and writing texts, a strong drive towards synthesis of subjects replaced the tangle of the forms of action.

Apart from the brief, fragmentary comments from which this collage is made, the bulk of the routine writing about the common law, expositions and debates about doctrine in articles and texts, prize winning essays, and lectures to law students, were composed virtually entirely of analysis of cases. Moreover, the analysis tended to take the form of a case by case accumulation, rather than integration and synthesis. The standard of correctness or winning a debate was consistency with the cases, or the majority of them, and the differences of opinion were about the accuracy of different readings of the cases. Context or values were never considered, although they were occasionally expressly declared to be irrelevant.

The only Canadian lawyer who wrote at any length about the common law was A.F.N. Lefroy, whom we will see again, in considering federalism. His thought was typical of this late nineteenth century thought. Throughout his writing, the work of the courts in applying the settled common law appeared to be objective and apolitical. They found facts and applied the appropriate general rule, and the scientific process ensured that there would be only one appropriate rule, even though determining it might be difficult and debatable. This common law was autonomous, although this concept does not mean that Lefroy believed the law did not express values about society, for he clearly did: the sources from which it was made were all statements of values, but they all seemed to be abstract and independent from their immediate context of place and time. There was no suggestion in any of the examples of law-making that there was a choice between social interests or classes at stake.

This autonomy was fortified by a sense that lawyers, especially judges, were the custodians of the legal science and the process of making law from these values and applying it. It was probably also related to the explanation for the rule that settled law could not be changed. Considering change, conceived as anything different from correcting a error in reasoning, would involve considering some particular social and political context, and might ultimately suggest that the common law and its basic principles were contingent upon the conditions of each society.

Lefroy's positivism, his faith in precedent, and his general understanding of the common law all might have been found in any common room or text in England. His major effort and his claim to distinctiveness was his discussion of law-making. How could judges make law, and also be objective and apolitical? Most thinkers of his generation considered this problem, perhaps because the dominant positivism had made it pressing. Lefroy found the resolution in the process of reasoning from the basic principles and understandings. The courts did not declare their own personal wills or choices. Instead their work was "discovering the implications and equities inherent in the transactions and relations of mankind," and declaring "the law's intention" that was embodied in the terms of the broad principles.

The Readings and Some Questions

The Inaugural Address demonstrates some of the understandings about law and legal reasoning, as well as legal education. It is, though, background. Dicey is central. He was one of the major English legal scholars in the late nineteenth century, and his text was the dominant constitutional text for decades. Reading it gives an understanding not only of the basic knowledge of constitutional of English and Canadian lawyers, but their assumptions about law and how to think about law. We will return to it a couple of times during the sessions that follow, in discussions of both rights and federalism; this chapter is intended to be no more than an introduction.

Here are some questions for reading and for discussion:

1. What was Dicey's understanding of his job as teacher and as the author of the book? This question is pretty easy, because the answer is given in his own words in his Introduction, so the next question is, what sorts of assumptions about law and thinking about law did his understanding entail? How did these assumptions shape the text?

2. What did Dicey mean in the claim that the American constitution ("the institutions of America") was "a gigantic development" of the ideas at the bottom of the English political and legal institutions?

3. The "rule of law" is something that all sorts of societies have believed in and something that English lawyers believed in long before Dicey wrote. What seems to be distinctive about his understandings - or, what are its fighting edges?

4. What was Dicey's understanding of rights, and why did he believe they were so well protected in England?

5. Here is a passage about Dicey from S. Collini, *Public Moralists* (Cambridge, Cambridge U.P., 1991)

> Dicey ... pulled off a remarkable coup: his Law of the Constitution, first published in 1885, managed to make the ordinary operations of the common law central to the characterization of the distinctive identity of the English nation. In so doing, he achieved the improbable fusion of the Wig interpretation of English history, the Austinian analysis of law, and the Individualist conception of the state, the whole amalgam presented as the dispassionate conclusion of academic legal science.

What on earth did Collini mean? (Maybe we should know lots about Whig history, and Austin, but here, I hope it is enough to say only this: First, the Whig interpretation of English history is an interpretation (a story) of history of the English peoples that traces the slow progress towards liberty; it is well represented by the quotation from Hallam at the outset of the Dicey excerpt. Second, Austin is a nineteenth century English legal thinker who is famous for separating law and politics, and for making the idea of the sovereign central to legal analysis.

INTERPRETATION IN THE LATE NINETEENTH CENTURY

In 1892, the Privy Council announced that the B.N.A. Act must be interpreted "by the same methods of construction and exposition which they apply to other statutes (Bank of Toronto v. Lambe (1887), 12 A.C. 575 at 579). These "methods" were not discussed at any length by the Canadian writers, because they needed no discussion: they were widely shared and the English texts were conveniently at hand and unproblematic. One of the standard texts, Maxwell, *On the Interpretation of Statutes,* can serve as an example, even though no single source can embody all the complexity, detail, and variations of the period. Maxwell's first sentence was, "Statute law is the will of the Legislature; and the object of all judicial interpretation is to determine what intention is either expressly or by implication conveyed by the language used." This single sentence encapsulated his basic faiths: the legislature had a will, which could be expressed in words; task of interpretation was discovering the meanings of these words, and these meanings were independent of the interpreter and the process of interpretation.

Maxwell continued by saying that if the meaning of words of a statute was "free from ambiguity," it must prevail, even though it might be unreasonable or unjust. Contrary to some caricatures drawn by twentieth scholars, neither Maxwell nor any other text-writer of his period believed that meanings were always plain, awaiting discovery. A few lines later, he said, "... language is rarely so free from ambiguity as to be incapable of being used in more than one sense." When language was "open to doubt, and capable of receiving more than one construction, the true meaning" was to be sought by considering the words in their context within the statute, their history, and "certain general principles. Most of the remaining 350 pages of the text elaborated these sources of meaning. Throughout this elaboration, the courts and the common law were central. In particular, the "certain general principles," were largely common law presumptions, made by courts. Much of the content of these presumptions was a consolidation of widely shared liberal constitutional values, but as well much was an expression of economic and class preferences, which were often at odds with the manifest intention of the legislature.

The process of determining meaning was independent of context, values and needs. In particular, ideas about the kind of federalism that might be appropriate for Canada were simply irrelevant. In the course of a debate about a controversial decision about the power of provinces to regulate sittings of courts, one British Columbia lawyer declared that the opinion of Alfred Todd's opinion deserved no respect: Even though he was an eminent constitutional scholar, he lacked "long years of legal training," and his work as an historian might have given him a "broader range" but it might also have given him a "tendency to look at expediency or policy." (An Exile, "Administration of Justice in British Columbia" (1882), 18 Can L.J. 244 at 245)

Another example is a passage from A.F.N. Lefroy, who appeared briefly in the first chapter, in his text, *The Law of Legislative Power in Canada* (Toronto: Law Book and Publishing, 1897-1898). It was the leading text on the division of powers and we will see it at length later. Lefroy declared that, because a constitution could not expressly provide for every possibility, "use was made ... of general language, containing in principle the conferred powers, and leaving to legislation and judicial interpretation the task of completing the details." His understanding here was that the B.N.A. Act contained the essential meanings, and he did not imagine that the courts were to have any original or creative power. Near the end of his discussion he quoted from a major American constitutional text by Joseph Story, about the need for interpretation, "influenced by the demands of public policy and public welfare." For Lefroy such matters were irrelevant to interpretation, and he fled quickly to his basic belief in the general principles. Lefroy did, though favour a "liberal" interpretation. In Proposition Three, he quoted the Privy Council about interpretation, and added, "... [other statutes] of a similar character, that is to say, statutes conferring constitutional charters. The B.N.A. Act cannot be construed in a rigidly technical manner." This awkward formulation was probably more than a muddled attempt to synthesize inconsistent cases. Lefroy seemed to hope that constitutions were a distinctive kind of statute, which was just what the Privy Council sought to deny.

One tempting source of information about legislative intention was the debates preceding Confederation, which were within memory of most judges and writers. The settled doctrine, however, was firm: the only kinds of history that could be considered were the common law and earlier statutes. Social and economic history, and evidences of the plans and intentions of the legislators were utterly inadmissible, a limitation that made interpretation seem apolitical and supported the power of the courts, by preferring the common law presumptions to evidence of legislative intention. In Canada, the firm exclusion of context and history was required by their faithful following of English models, but this obligation does nothing to explain the limitation itself. Ultimately, it was based on the nature of the threat history presented. To consider debates and context, in preference to the common law principles and presumptions, threatened to deny the lawyers' power, and to erode the property of their clients and friends. These were formidable costs, and formidable pressures to eschew history. This limitation was a sharp contrast to understandings of interpretation in other disciplines, especially literature and religion. Throughout the nineteenth century, the Protestant churches in England, the United States, and Canada struggled with the question whether the history of doctrine could affect its meaning. Was the bible just like any other book, to be read by the understandings that guided reading other books? Throughout the second half of the century, the churches accommodated these challenges and their doctrine.)

The separation of interpretation from value and history did not, though, entail a belief that law was entirely autonomous. A passage from another text, Clement's

The Law of the Canadian Constitution (Toronto; Carswell, 1892) suggests that the thought was not so simplistic. Speaking about Confederation, he said, "opinions may very reasonably vary at different periods as to where the line should be drawn that is to divide matters of common or "national," from matters of "local" concern." The choice of the line was a matter of opinion - contingent and political, and there was no essential nature of local and general. Yet once the line was expressed in the B.N.A. Act, it became law, "a thing certain," to be determined by the objective legal science, and arguments about where the line should be drawn in order, for example, to encourage economic development or to protect distinctive cultures became entirely irrelevant. The line between general and local expressed in the B.N.A. Act was at the same time both an expression of values and an objective standard. In his discussion of the aspect rule, Clement said,

Of any number of laws put forwards as determining the "legal relation," only one is the law which governs. The views of advocates, and even judges, may conflict, but the law, though it may be, from time to time, varied at the will of the law-making body in the state, is at any given moment of time, a thing certain.

The lawyers' limitations were a sharp contrast to understandings of interpretation in other disciplines, especially literature and religion. In 1889, in the course of giving an inaugural lecture at University of Toronto, W.J. Alexander talking about reading a book, said, "To complete our understanding of the work, or our conception of the writer, we must know something of the intellectual atmosphere which surrounded him, of the current of thought and of the spirit of his time. In doing this, we pass from the study of the individual writer to the study of the period in which he lived." The contrast is even more marked in theology, where the nature of the authority of the bible was put in turmoil by two strains: first, Darwin's ideas about evolution and second, the "higher criticism," movement that argued that the bible must be interpreted in the light of its history and context. In 1881, Nathanial Burwash, the dean of theology at Victoria College, said that language of any text "bears the peculiarity of the age the nation, the writer."

Why were lawyers different? Their firm exclusion of context and history was required by their faithful following of English models, but this obligation does nothing to explain the limitation itself. Nor is the lack of any apparent sense that developments in other disciplines might be relevant an explanation, for Darwin's theory was widely known, at least in a superficial way (in the same way legal scholars now know economics?), and lawyers were sufficiently entangled with the Anglican church to give them some knowledge of the threat from the higher criticism. Maybe the limitation was based ultimately on the nature of the threat history presented. To consider debates and context, in preference to the common law principles and presumptions, threatened to deny the lawyers' power, and to erode the property of their clients and friends. These were formidable costs, and formidable pressures to eschew scholarly developments elsewhere.

A good example of this set of faiths at work is a debate about *Royal Bank of Canada v. The King,* a decision of the Privy Council made in 1913. The issue was the entitlement to the proceeds of bonds issued by a railroad under construction in Alberta, and sold in England under an agreement providing that the proceeds were to be paid into an account of the Royal Bank in Edmonton, to be disbursed as construction proceeded. After the railway floundered, Alberta enacted a statute expropriating the proceeds, which the bondholders challenged, and the crucial doctrinal issue was the location of the proceeds. Reversing the Supreme Court, the Privy Council held that the locus was Montreal, the head office of the Bank, and not Alberta, and therefore the claim of the bondholders to recover the proceeds (because the purpose had ceased to exist) was "a civil right outside the province," and the legislation was invalid.

The debate, waged from 1913 to 1915 in twelve articles, involved three of the major writers of the period and a couple of minor supporters. The first to enter the ring was Lefroy. He defined a civil right as a power to "invoke the aid of the courts of the province by way of action or by way of defence." Because the bondholders had a right to sue the Royal Bank in Alberta, the Treasurer had the same right. Therefore, the claim was a civil right in the province, and the legislation was came within s. 92-13. He argued as well that bondholders also had a right to sue the Bank at its head office in Quebec, implying that Quebec could have enacted similar legislation. Next came J.S. Ewart, from Winnipeg, well-known to Canadian historians as supporter of independence for Canada, one of the leading counsel, and a remarkably powerful thinker, albeit a cranky and erratic one. He argued that the money was in the province, and it was therefore "property" within s. 92-13, or an asset of the company that could be expropriated under s. 92-10. The last of the three principle protagonists was C.B. Labatt, who defended the Privy Council. He was not as learned as Lefroy or as imaginative as Ewart, but was an editor of the Canadian Law Journal and the most prolific periodical writer of the period. He argued that the definition of civil right should be derived from private international law - a substantive right incident to property. According to this principle, the proceeds were in Quebec, not Alberta, and the legislation was therefore ultra vires.

The debate was often heated, but despite their disagreements, all three scholars shared understandings of legal reasoning and interpretation, and basic principles about division of powers issues. Outcomes should be determined using these principles, and subsidiary doctrines appropriate for particular cases, such as the common law doctrines about the location of a debt. In the application of these principles, the nature of federalism, the historical understandings that might illuminate the B.N.A. Act, and the contemporary context were simply not permitted or even contemplated. For example, Labatt and Lefroy did not justify their definitions of civil rights, except for a vague reference to the autonomy of the provinces by Lefroy, and none of the three considered the vulnerability of non-resident bondholders, or the effectiveness of democratic responsibility as a limit

on provincial legislatures, even when considering whether Alberta or Quebec, or both, could legislate. Considerations of this sort were not simply irrelevant; instead, they were embedded in the general principles. (My reading, and it is certainly debatable, is that this is what Clement meant in the passage that preceded this account of *Royal Bank*. Certainly outcomes might sometimes be affected by this kind of influence, but this possibility was no more than the possibility of human error and fallibility.

Their understandings about legal reasoning illuminate the gulf between law, and politics and context. In his reply to Labatt, Lefroy challenged a claim, made by one of Labatt's supporters, that no one could doubt the "perfect justice or wisdom" of the Privy Council's decision.

All I can assume to discuss is law, not perfect justice or wisdom. Law may be, and ought to be, just and wise. But whether it is or not, is a matter with which a lawyer, as such, has nothing to do. That is what the old philosopher Hobbes meant when he laid down the dictum so shocking to weak minds, that "no law can be unjust."

Labatt agreed. After Ewart had suggested that the Privy Council had been influenced by a desire to protect property and British investors, and that such influence was not only improper, but a reason for abolishing appeals, Labatt rushed to its defence. Its ignorance of Canadian conditions, which Ewart said was a disqualification, was really an blessing.

A controversy determined by jurists of ample practical experience, who consider the law and the facts with the intellectual detachment of College professors forming an opinion in regard to the soundness of abstract doctrines may well be said to have been determined under ideal conditions.

FEDERALISM IN THE LATE NINETEENTH CENTURY

The major items in this section are excerpts from two texts, by O'Sullivan and Lefroy, and our objective will be to reconstruct their understandings about federalism and about ways of thinking about law and legal reasoning. We begin, though, with notes about Confederation, the provincial rights movement, constitutional scholarship, and the issues that shaped these two texts.

Confederation and Provincial Rights

The major purposes of Confederation, in 1867, were to make a defensive alignment against the United States, to enable expansion to the west, and to resolve a deadlock between the English and the French who had been combined in the large province of Canada since 1841, and who were now divided between provinces of Ontario and Quebec. The objective was to create a powerful, even dominant, Dominion, especially for developing the economy, and at the same time to permit the provinces to determine their local affairs, although there was no clear understanding of what local matters were, except that religion was included. During the preliminary discussions, there were differences of preference and interpretation, about large matters and small ones, and much confusion and misunderstanding. There was no widely shared and comprehensive model or theory of federalism, especially about sovereignty, the relation of the Dominion and the provinces, and the division of powers.

The B.N.A. Act itself created the basic structure of federalism. Legislative powers were divided by sections 91 and 92. Section 92 gave the provinces power to legislate about specific subjects, including "property and civil rights" (section 92-14), and "all other matters of a local and private nature" (section 92-16". Section 91 gave the Dominion power to legislate for the "peace, order, and good government of Canada," excepting the subjects given to the provinces. As well, "notwithstanding" this general grant, section 91 gave the Dominion enumerated powers, including powers to establish a national economy, and concluded by saying that these enumerated subjects were "deemed" not to be matters of a local and private nature. Schools established by minority religions were protected by section 93, and duality of language was given modest recognition in section 133. The Dominion was given substantial controls over the provinces, especially a virtually unlimited power to disallow their legislation, and powers to appoint their lieutenant governors and the judges of superior courts. Any constitution, though, and perhaps any text, must leave much to be determined in the future, and the B.N.A. Act contained more than its share of gaps and inconsistencies.

During the three decades that followed Confederation, politics was dominated by a struggle between the Dominion and the provinces, principally Ontario. For most of this struggle, the Dominion was governed by the Conservative party, led by Sir John A. Macdonald, and Ontario was governed throughout by the Liberals, led by

Oliver Mowat. The reasons for their struggle have been debated at great length. Some historians, perhaps most, argue that it was a product of political opportunism by the provinces, and inconsistent with the agreement at Confederation, but others, understanding Confederation differently, see it as a continuation of a long tradition of local autonomy. Whatever the reasons, a wide range of issues, were involved, including the financial terms of Confederation, the location of the boundary between Ontario and Manitoba, the nature of the provincial legislatures, the powers of the provincial executives, the use of the disallowance power, and the division of legislative powers. These issues were contested on a wide range of battlegrounds, including newspapers, election platforms, legislatures, and courts.

By 1900, the provinces had triumphed. Whether the federalism that was established by this triumph was a betrayal of the federalism that was designed at Confederation is another question about which there is a rich literature. This question involves not only an understanding of the federalism designed in 1867, but an understanding of the federalism established by the triumph, especially the decisions of the Privy Council in the 1880s and 1890s. The answer is not crucial to our undertaking, and a modest assessment is enough: in 1900, the Dominion was significantly less powerful than most of the participants in Confederation would have expected.

Constitutional Scholarship

For more than a decade after Confederation, neither lawyers not anyone else wrote much about the constitution. Books and articles begin to appear regularly around 1880, and by 1900, four major books had been published, and about a hundred periodical articles.

These writers shared one basic belief, and all lawyers would have agreed with them: the essence of the Canadian constitution was the British constitution coupled with federalism, an essence captured for them by the Preamble to the B.N.A. Act, which declared that the colonies wished to be "federally united ... with a Constitution similar in Principle to that of the United Kingdom." They took great pride in this distinctive coupling: O'Sullivan, saw "a new departure in colonial government," and Clement, another of the text writers, began by declaring that "a new thing under the sun" had been created in 1867.

Whatever their leanings in Canadian politics, they all professed loyalty to the glories of the British constitution. One small, but revealing manifestation of this faith was their reaction to a stray comment by A.V. Dicey, In the first edition of *The Law of the Constitution,* published in 1885, he said that Canada's constitution was modeled on the constitution of the United States. The Canadians were outraged, and took great pains to demonstrate Dicey's error: their constitution was essentially British - and therefore not only different from the American, but far

superior. Both Lefroy, in his Introduction, and Clement, in his opening chapter, argued at length that the essential difference between the United States and Britain was parliamentary government, and measured in this way, Canada could hardly be similar to the United States. Clement even went so far as to argue that Britain and her Empire was "as truly federal .. as the United States," and therefore federalism or a written constitution could hardly mark a crucial difference. Relying on Bagehot and Woodrow Wilson, he lauded the flexibility, the harmony, and the focusing of responsibility in parliamentary government, which he contrasted to the rigidity, friction, and diffusion of leadership in congressional government Lefroy said much the same, stressing as well the capacity of parliamentary government for "organic growth."

It was federalism, though, that commanded the attention of the writers. Even though O'Sullivan and Clement wrote about a wider range of topics, it was federalism that stimulated them and provoked their most careful and most lively efforts. Travis and Lefroy, the other two major authors, wrote entirely about federalism, and so did almost all of the writers in the periodicals. In contrast, there was very little discussion of basic constitutional theory, the British constitution, or individual rights.

This emphasis on federalism was a product of three reasons. First, and more important, it was federalism that was both distinctive and challenging. The British constitution invoked by the preamble seemed well settled, and it was recorded in a myriad of familiar books. Federalism, the other element of the Canadian constitution, was unexplored. True, the example of the federalism of the United States was close at hand, but its appeal had been dimmed by the Civil War and by a pervasive turning away from things American, and much of Canada's federalism was not only different, but deliberately different. Moreover, the union of federalism and Parliamentary government seemed to be not only distinctive, but, as we shall see, problematic: how could a monarchy be combined with federalism?
Second, the struggle between the Dominion and the provinces was ultimately, as we shall see, a struggle about the nature of Canadian federalism, and it created a pressing need to articulate claims and to synthesize doctrine. Third, most of the work of the courts was about federalism. That is, most of the cases that might be called "constitutional" were about federalism in one way or another, and this generation of lawyers put the courts at the centre of the legal universe and made analysis of the cases the primary focus of scholarship.

The Issues and the Model of Autonomy

Having said that federalism was the major topic, I can proceed to say that two themes or topics of federalism were dominant: what was the nature of Canadian federalism? and what was the division of legislative powers between the

Dominion and the provinces? Even though they overlapped, it is convenient to introduce each in turn.

The first question, about the nature of Canadian federalism, had at its basis questions that might be asked about any federation: what was the relation between the local and the central governments, and the relation of both to the citizens? Given this general frame, it took its particular form in Canada in three overlapping sets of questions. The first were about the provincial legislatures: what sort of institutions were they? Were they the same as the Dominion Parliament? That is, were they Parliaments - with all the inherent powers and capacities of the British Parliament, or, instead, were they merely law-making bodies, created by the B.N.A. Act and having only the powers it gave them. Second, what were the executive powers of the provincial governments, and in particular, were their executives independent of the Dominion executive? Section 58 of the B.N.A. Act specified that the lieutenant-governors were to be appointed by the Governor-General in Council. Having been appointed in this way and not by Her Majesty herself, did they have prerogative powers, or did they have only the powers granted to them by the Governor-General? And third, what were the appropriate uses and limits of the Dominion's power of disallowance? One grand question stood for all three questions, and its answer was the sum of the answers to all of them: were the provinces subordinate to the Dominion, or equal and autonomous? These questions have been settled so long that they have disappeared from the day to day thinking of constitutional lawyers and from constitutional law courses. Nonetheless, for the lawyers in the late nineteenth century they were urgent, much more urgent than the second question, about the division of legislative powers.

Maybe it will be useful to have a thesis or target to guide reading of these texts. To this end, I present my own reading: The eventual answer, or the principle that underlay all the answers, was the model of autonomous federalism. The provincial legislatures and their executives were independent of the Dominion, and had exclusive authority in their own spheres. This was, though, certainly not the model of Confederation. The British North America Act, gave the Dominion extensive powers of supervision: power to appoint the judges of the superior courts as well the lieutenant-governors, and powers to disallow provincial legislation and to create a Supreme Court with comprehensive jurisdiction. Autonomous federalism was, though, the model proclaimed by the provinces, and by the mid 1880s, it was central in lawyers' thought and the dominant model for interpreting the B.N.A. Act

Because this model was not the model of Confederation, an account of its appearance can be a useful part of this introduction, even though it will take a few pages. It was first presented by someone named David Mills, and he is interesting enough to stop and describe him. He was a school teacher and superintendent in Southwestern Ontario until early in his thirties, when he went to law school at the University of Michigan, at a time when it was highly unusual for anyone from

Ontario to go to law school in the United States. At Michigan, he studied under the great constitutional scholar, Thomas Cooley - and the significance of this step will become apparent later. Returning to Canada, he became a Liberal member of Parliament, and as well, a practicing lawyer, teacher, newspaper editor, and, eventually Minister of Justice, and a judge of the Supreme Court. He has never escaped the reputation of being a pedantic bore who lacked imagination or insight, a reputation captured by Macdonald's caricature of him as the "schoolmaster from Bothwell." Nonetheless, he was one of the most learned and intelligent of the lawyers.

He began to argue for the model in the late 1860s, in speeches in Parliament in the late 1860s and early 1870s, and in a remarkable letter from him to Macdonald about Macdonald's proposal for a Supreme Court. Macdonald's proposed court had jurisdiction over matters within provincial legislative jurisdiction, and Mills protested that this jurisdiction was inconsistent with the basic principles of federalism. The proposal floundered for other reasons, but eventually a Court with the expansive jurisdiction was created.

Mills espoused his beliefs consistently and passionately until he left politics at the end of the century, but for a decade or more, he was the one to speak in a comprehensive way. In the early and mid 1870s, Oliver Mowat presented fragmentary versions in debates with the Dominion and the Colonial Office, claiming that the provinces could appoint Queen's Counsel, and that they, not the Dominion, had the right to escheats - the contrast between the triviality of these issues and the significance of the principles at stake is amusing, whatever else it may be. The claim to appoint Queen's Counsel involved the claim that the lieutenant-governors could exercise prerogative powers, and the claim to escheats involved both interpretation of a couple of sections of the B.N.A. and the argument that the provinces were the original colonies, retaining their original properties and powers, except so far as they had granted them to the Dominion in B.N.A. Act.

As the campaign of the provinces mounted, the late 1870s and early 1880s contained much uncertainty and confusion. Mowat presented the model in fuller way in arguing before the Supreme Court in 1877 in *R. v. Severn.* In 1879, the Court decided *Lenoir v. Ritchie.* Although procedural issues confused the outcome, three members said that the lieutenant-governors had no prerogative powers, and Gwynne J., the strongest supporter of the Dominion, went out of his way to use the dreaded word, "subordinate." In 1883, in *A.G. Ontario v. Mercer*, the same three members denied the autonomy and primacy of the provinces. The Privy Council reversed, but limited itself to interpreting the specific sections of the B.N.A. Act.

The Ontario Court of Appeal, in contrast to the Supreme Court, adopted the model enthusiastically from 1878 onwards. In 1882, in *Hodge*, which gave the provinces

authority to regulate taverns, it declared that their legislatures were supreme within the limits of their powers and had the same kind of authority as the Dominion Parliament, and two years later, the Privy Council affirmed, using much the same language.

Turning to the writing, the texts and article in the late 1870s and early 1880s did not contain any sustained consideration of these issues, and first substantial exposition of the model of autonomy after Mill's speeches was in a set of public letters written by T.J.J. Loranger, a Quebec politician and judge, who was impelled to write by a fear that the Supreme Court was threatening Quebec's autonomy and the French race. He claimed passionately, although without much detail or elaboration, that the basic principle of Confederation, and a fundamental condition of Quebec's acceptance, were equality of the Dominion and the provinces, the autonomy of the provinces, and mutually exclusive spheres of power, which he contrasted to an illegitimate model - the model of subordination. The provincial legislatures were Parliaments, and the lieutenant-governors representatives of Her Majesty. We will consider Loranger later, as one of the first proponents of the compact theory of Confederation. In 1887, the model of autonomy was presented in a comprehensive and aggressive form in the first of our two texts, O'Sullivan. A decade later, it appeared in the second text, by Lefroy, and here, it was settled doctrine.

Where did the model of autonomy come from? Mills, O'Sullivan, and Lefroy were not original, creative thinkers, and they did not expound the model of autonomy in isolation. Its general structure had accumulated since the making of American federalism in late eighteenth century; for example, the language about exclusive spheres first appeared in Madison's Federalist 39. For the Canadians, the most common sources of this structure were the great American constitutional texts by Cooley and Story, and a history of federalism by the English historian, E.A. Freeman. A specific connection between Cooley and Mills is a more specific source. After spending his early adult years as a school teacher and superintendent in Southwestern Ontario, Mills went to law school at the University of Michigan in the early 1860s. Here, he studied constitutional law under Cooley and faithfully recorded much of the basic elements of the model in his notes.

An emphasis on particular authors and particular connections, and a search for who read which book first, must not obscure the widespread acceptance of this model. When the provinces made their arguments in *Hodge*, *Maritime Bank*, and the *Local Prohibition Reference* they appealed to an understanding of federalism that was already established in the judge's minds.

These sources did not, though, contain the entire model. The emphasis on the autonomy and equality of the governments, and the exclusiveness and sharp boundaries of the spheres gave the Canadian model a distinctive sharpness or fighting edge that made it different from the US experience. Examples are the way

O'Sullivan framed his definition, and the way Lefroy used the model so rigorously throughout his extensive analysis. The notes that Mills took from Cooley contained the elements of spheres of power, but not these distinctive edges. Nor did they appear in any other of the major texts.

I can suggest three reasons for this difference. The first and major one is that the model was being used in the political debate. Even though the general structures and particular pieces of the model were already available, they had been shaped in different contexts and for different purposes. The Canadians' job was to articulate a theory of federalism in a context in which there was no serious thought of separation, at least after the first few years, and no doubt at about the power of the national government to affect the citizens directly, or the legitimacy of judicial review, as there had been in the United States. Instead, their context was the struggle between the model of Confederation and the ambitions of the provinces. The advocates for the provincial cause, in whatever forum they appeared, presented their cause as forcibly and comprehensively as they could.

The second reason is mid-nineteenth century liberalism: the spheres of power and their sharp limits that defined the relation between the Dominion and the provinces were shaped by ideas about the relation among individuals in the liberal state. Except for one remarkable footnote by Clement this relation was not described, but it may explain why the model was so appealing to lawyers. In his preliminary discussion of the British constitution, Clement appended this footnote, which had little connection to its context:

The federal idea is nothing more than the logical outcome of the "individualistic" idea, which lies at the bottom of self-government; and it would be an interesting task to trace the growth of this idea from its root in the belief that man has certain "natural rights," and that society controls his exercise of those rights only to the extent to give proper play to the rights of his fellow-men, up through the growth of municipal self-government to the establishment of a federal system of government, logical from root to topmost branch

The third reason, closely related to the second, was that the model was congruent with lawyers' ways of thinking about law generally in the late nineteenth century. We will come to this topic later, but here, it is enough to say that spheres of power, autonomy, and sharp, binary distinctions were all part of lawyers' understandings about law and legal reasoning generally, and were manifested in the analyses of federalism. The second and third reasons explain much of the power of the provincial claims: the arguments appealed to deep and pervasive strands in lawyers' thought.

The Division of Powers

The second of the two major federalism topics was the division of legislative powers between the Dominion and the provinces. It too, was a battleground in the struggle between them, and here, too, the provinces triumphed, although the triumph was not nearly as great or as clear as their triumph about the nature of the federalism.

The first questions to be considered in a substantial way in the writing were about structure of sections 91 and 92: what were the relations and priorities among their various parts? What did the "notwithstanding" and "deemed" mean? These sorts of questions can seem wonderfully arcane now, especially because many lawyers now have little faith that the answers can determine outcomes for particular cases, but to the lawyers at the time, who had a larger faith in the power of doctrine, they were forums for fighting grand questions of principle and power. The text permitted different readings, and the differences often seemed to entail large consequences for the struggle between the Dominion and the provinces. The most interesting question, and the one most accessible to modern readers, was whether sections 91 and 92 were a grant of two general powers, or, instead, did the Dominion have power to legislate over the enumerated subjects in section 91, together with the residue of the power remaining after the grant of specific powers to the provinces? The early texts, especially the ones favouring the provinces - especially O'Sullivan, argued for two general powers, but this reading perished in Lefroy's text.

During the late 1880s and early 1890s, the grand questions of structure were replaced by more confined questions about how to decide particular cases. A large pile of judgments had accumulated, but no widely accepted general principles for understanding them had emerged. An example of the uncertainty was a debate in the journals about the work of the Privy Council in the early 1890s: several eminent lawyers complained that they were unable find a pattern in its judgments. Most striking to a modern reader, they were unable to find any common ground between *Russell* and *Hodge*. *Russell* seemed to give power to regulate liquor to the Dominion and *Hodge* seemed to give the same power to the provinces. The aspect rule, which was announced in *Hodge* itself and which any first-year student would now use to reconcile them, was not part of the shared language of doctrine. A few years later, Lefroy undertook a synthesis, and set out principles that have endured for nearly a century, and continue to be standard fare in teaching materials: pith and substance, the difference between "in relation to" and "affecting," necessarily incidental, aspects, and paramountcy. And *Hodge* and *Russell* were made consistent. Lefroy's work, as he understood it, was simply to synthesize the cases faithfully, but he gave the doctrine a coherence and internal consistency that it did not have before.

Legal Reasoning

So far, my account of the writers and their writing has been primarily about the substance of their thought. I turn now to their beliefs about law and legal reasoning. What did judges do when they decided cases, and what they should do? What kinds of reasoning and arguments were appropriate for talking about law and deciding cases, and what kinds were simply unimaginable? What were their models and the sources of their ideas?

To begin with the last of these questions, about models and sources, one simple conclusion is clear: all these writers derived their ways of thinking primarily from England. The quarrel with Dicey about the design of their constitution was trivial compared to the pervasive acceptance of the English models. The Canadian writers were familiar with the major constitutional writers in the United States, such as Cooley, Story and Kent, but would never have preferred this writing to the English texts. Late in the period, they seem to have been entirely unaware of some of the scholarship in the United States that challenged and eventually undermined their ways of thinking. Lefroy, for example, in all his writing up to his death in 1917, never cited Holmes, Pound, or Gray.

The dominant beliefs about legal reasoning were described in the introductory chapter. They dominant in Canada by 1900, and these texts suggest that it emerged late in the century. There were several large and closely related changes from O'Sullivan, writing in the late 1870s and educated in Canada in the middle of the century, to Lefroy writing only fifteen years later, in the late 1890s but educated at Oxford a generation later at the centre of the changes. The expected readers changed from educated citizens and law students to lawyers and judges; the range of subjects narrowed from the principles and institutions of government to doctrine about the division of legislative powers; and finally, a sense of context and history virtually disappeared, and the emphasis on courts expanded greatly.

Lefroy's book is the prime example of the English models - even Dicey gave praise. Having said in the Preface that his objective was to "extract" general principles from the cases, he wrote a text composed of 68 numbered propositions, set in bold type, and followed by extensive commentary, almost all paraphrase or quotations from the judgments. The one that are reproduced here are representative. The doctrine was presented with no account, and barely any mention, of its social and political context. The struggle between the Dominion and the provinces was barely mentioned, and the Manitoba Schools Crisis, which we see later, and which was raging at the time he wrote, did not appear at all. The literature in other disciplines was never mentioned, not any of the constitutional writing in Quebec, except for Loranger's *Letters.* Yet even Loranger was considered by the common law writers only because he had said something about their issues, and in a way that they understood. They did not wonder about a threat to the French race, and saw no illumination for their work from Quebec's distinctive experience.

The Two Texts - Finally

We come at last to the two texts, for which all these notes have been an introduction. The first is the second edition of A *Manual of Government in Canada* written in 1888 by a Toronto lawyer, Dennis A. O'Sullivan, known to historians - at least specialists - as an lay official in the Roman Catholic church. As its title suggested, the Manual sought to describe the government of Canada. After an historical sketch stressing the rise of responsible government, O'Sullivan surveyed the structure, functions and powers of the major institutions: the crown, the legislatures, the government departments, and the judiciary, and concluded with an account of individual rights. Throughout, his survey was brief, with little or no analysis. O'Sullivan did not specify whom he was writing the *Manual* for, but it did not have enough analysis of doctrine to be useful to practicing lawyers and courts. The most appropriate audience was intelligent citizens and, perhaps, students, although at the time the first edition appeared, there were few law students who would have had any need to read it.

There are three passages here: the first is Chapter One, "The Monarchical Federation" which begins with a survey of Confederation and the B.N.A. Act, and then shifts to federalism. After the crucial definition of federalism, he turns to a discussion of the provincial executives. The problem he is worried about is set out in the notes: are the provincial executives independent of the Dominion? My reading is that his discussions of sovereignty and the monarchy have this problem in the background. He says a bit about judges, and then shifts to the British constitution, where his worry seems to me to be, can we really have this glorious constitution and federalism too? The second is part of Chapter Two, "The Constitution of Canada," about a compact and the division of powers, and the third is Chapter Twelve, "The Constitutions of the Provinces."

The author the second text, A.H.F. Lefroy was educated in England, and he became a teacher, albeit late in his career. Born in Toronto, he took a B.A. at Oxford, and was called to the bar in England in 1877, and in Ontario the following year. During the 1880s and 1890s, he practiced in Toronto in a series of small partnerships, and began to write extensively about constitutional law, especially federalism. His first and by far his most important book was *The Law of Legislative Power in Canada,* which appeared in 1898. A few years later, he was appointed Professor of Roman law at the University of Toronto, and expanded his writing to include common law theory and Roman law, as well as writing three other books about constitutional law.

Propositions 1 and 2 seem to me to be about the nature of the constitution. Proposition 3 is about interpretation; 7 and 8 are about the executives; and 17 is about the provincial legislatures. Propositions 20 and 21 are about legislative supremacy, and 24 to 28 are about the general structure of the division of powers. Propositions 35, 36, and 37 are about the general principles for accommodating

the powers: aspects, pith and substance, "affecting and in relation to," and necessarily incidental." Proposition 38 returns to interpretation

Some Topics and Questions for Discussion

1. What did O'Sullivan and Lefroy conceive the nature of their job to be? Did they differ?

2. Why are they so preoccupied with federalism? I've offered an explanation in the notes, but I'm not sure ....

3. For O'Sullivan, what were the major features of federalism?

4. Why was the monarchy such a stumbling block for him?

5. Am I right in my claim that Lefroy's text is an expression of the model of autonomy.?

6. How, in the minds of these writers, especially Lefroy, should courts think when they decided division of powers cases?

7. What was the relation between the beliefs about judicial reasoning and interpretation, on the one hand, and the issue of substance, especially the model of autonomy federalism on the other. (This question seems to me to be crucial. I'd like to think there was a close relation, but some particular instances are needed if the thought is to be any more than an assumption based on an abstract faith that lawyers' minds aren't divided in a way that separates substance from the ways of reasoning.)

8. There is (is there?) a conspicuous lack of justification of federalism in the texts, or and a lack of any link between the visions of federalism and any values about a good life. True, the model of autonomy itself invokes a basic liberal value - autonomy, but why should the provinces have autonomy, and not the Dominion or North York? If I'm right in this observation, is the reason that lawyers just didn't think it was their job to write about this sort of stuff, or because there just wasn't anything to write about? Isn't this an important question about the identity of Canada? How on earth can we go about answering it?

9. What sorts ideas and interests were at stake in this debate and in this writing? Again, a thesis or argument may be useful. Here is a passage from R. Vipond, *Liberty and Community*, which argues that the stakes were ... just plain federalism. Another possibility, however, is that the debate was a battleground or mask for economic interests, for example, corporations that wished to diminish regulation or to exploit natural resources on favourable terms. How do we go about figuring out whether Vipond is right or wrong?

RIGHTS IN THE LATE NINETEENTH CENTURY

The Rivers and Streams Affair

I am a friend to the preservation of the rights of property,...but I believe in the subordination of those rights to the public good... I am content that my rights of property, humble though they are, and those of my children, shall belong to the Legislature of my country to be disposed of subject to the good sense and right feeling of the people of that Province.

This declaration about property, made by Edward Blake in 1882 is a wonderful beginning to thinking about rights in the late nineteenth century. Presumably, his beliefs were widely shared by Canadian lawyers, for he was the leader of the Liberal party and one of the leading counsel in Canada. Yet what he said would have seemed bizarre or outrageous to most lawyers in the United States at the same time, and surely they are at odds with lawyers' attitudes in Canada a hundred years later. How, we may now ask, could he be content to permit his rights to be at the mercy of a majority, and why did he not mention protection of rights by courts? To emphasize this contrast, consider the beliefs of another lawyer and another leader of the Liberals (and one who, unlike Blake, became a Prime Minister), P.E. Trudeau. Almost a century later, he said, "the purpose of living in society is that every man may fulfill himself as far as possible," and this fulfillment can only be achieved with "the triumph of the freedoms of the human being as inalienable rights, over and above capital, the nation, tradition, the Church, and even the state." And exactly a century (give or take a few days) after Blake spoke, the Charter of Rights and Freedoms was established.

This Chapter is divided into two parts, i) rights generally (plain vanilla thinking about rights?) and ii) rights and federalism, although these two parts are interdependent. The best introduction to both parts is the so-called Rivers and Streams Dispute. It began in the late 1870s as a quarrel between two loggers about the use of the Mississippi River, a small stream in eastern Ontario. One of them, Peter McLaren owned extensive timber lands on both sides of the stream. After making it usable by blasting rocks and constructing dams and slides, he used it to float his own timber downstream. The other logger, Caldwell, owned timber lands upstream, and attempted to drive his logs down the river - and through the improvements. After some squabbling, McLaren sought an injunction to prevent him. Their quarrel had wide-spread implications for Ontario's political economy, for logging was dominant in the economy of Ontario, and the streams were crucial highways for transporting the logs to mills and to markets.

In December 1880, Vice-Chancellor Proudfoot refused to grant the injunction. At the same time, prompted by the quarrel, the government of Ontario enacted The Rivers and Streams Act, giving anyone (and therefore any logger) a right to use

any stream, whether it was usable in its natural state or because improvements had been made, and gave the owner of improvements a right to "reasonable tolls." When the Dominion disallowed this Act, a debate in Parliament about the disallowance followed in April, 1882, which exposed fundamental beliefs about federalism, especially disallowance and provincial autonomy, and rights, especially common law rights. The episode ended as a major triumph for the provinces. Ontario reenacted the Act, and reenacted it again after it was disallowed again. Eventually, after the Privy Council seemed to support Ontario's position, the Dominion acquiesced.

The major speech for the Conservative government was made by Dalton McCarthy - a fiery orator, a leading counsel, and, as we shall see later, a fervent believer in a British Canada and an erratic political colleague. For the Liberals, the major speech was made by Edward Blake. Excerpts from both, and a few others, are reproduced in the next reading.

PRELIMINARY THOUGHTS ABOUT UNDERSTANDINGS OF RIGHTS

Even though Blake and McCarthy were enemies in this debate, they shared a large measure of constitutional beliefs. At bottom, they shared the faith in British constitution invoked in the preamble to the B.N.A. Act. More particularly, they shared a belief in common law rights, which they saw divided into two groups. Constitutional rights were rights to participate in government, especially responsible government, and included rights of representation and voting, and freedom of speech. The individual rights, our major concern, were the rights of individuals to liberty from restraint by government, especially freedoms of the person, speech, religion, and property, including McLaren's riparian rights. For these lawyers, these rights - and all of the law about the constitution - had been made, not in a revolution, not in the streets, and not by a philosopher in a code, but by judges, in an accumulation of decisions about individual cases. They were - common law rights. And here, recall the third element of Dicey's rule of law.

These individual rights were not, though, understood to be absolute and unrestricted. For centuries, the common law had limited them by the needs of the community. Blackstone had contemplated restraints that were "necessary and expedient for the general advantage of the publick," and generations of law students had read Paley's argument, in *his Moral and Political Philosophy*, that only restrictions for the public good were permitted, and had memorized the example he gave justifying quarantine. Their understandings of the restrictions that were permitted were narrow by our current beliefs or by the beliefs of the late nineteenth century, but the principles and the language were firmly settled.

As well as this belief in common law rights, McCarthy and Blake shared beliefs about legislative supremacy and constitutional obligation. Dicey said in 1885, that "Parliament ... has ... the right to make or unmake any law whatever, and further ... no person or body is recognized by the law of England as having a right to override or set aside the legislation of Parliament." Therefore, Parliament had, beyond any imaginable doubt, the power to extinguish McLaren's right to exclusive use of the stream and his improvements. At the same time, though, it had an obligation that both McCarthy and Blake recognized: it had a constitutional obligation to respect rights and the principles of the constitution, even though this obligation could not be enforced by courts.

If Blake and McCarthy shared all this, how did they differ? Of course, the politics of the moment made sharp and obvious differences, but they differed more deeply, and our account of their differences can best be introduced by posing two questions about limits on rights, which we suggested in our introduction: first, where should the limits be drawn, and second, who should have the power to make this determination?

The first question was, was the limitation of McLaren's rights legitimate? Blake did not respond at any length to McCarthy's arguments, perhaps because (as we shall see in a moment) he wished to emphasize Ontario's autonomy, but he might have, and other Liberals did. Even though the private dispute may have been the immediate spur for the Act, a public interest in the use of the steams was not hard to demonstrate. Mowat and his ministers had invoked the public interest in the logging industry when the Act was introduced, and the Act was only one of a long series giving loggers rights to use the streams. As well, arguably the tolls were adequate compensation, although this branch of the response was more problematic. This question was not, though, the crux of the difference between them - and nor was it the crux of the difference between Canadian and American lawyers.

The crux of the difference was the second question: who should make the decision about McClaren's rights? Even though he believed that the legislature was constitutionally obligated to respect rights, McCarthy looked to some external institution for supervision - to the Dominion, through disallowance (which soon ceased to be a major possibility) or courts. For Blake, the provincial legislature itself was solely responsible; the provincial community assembled in the legislature should decide its own needs. The recourse for a minority was not to invoke some external power, but to involve itself in politics. He put the position squarely in the course of an election speech in 1886, in which he returned to the Rivers and Streams question:

...I care not whether the Act is just or unjust, whether it is right or wrong, whether it is good or gad, whether it is robbery or not. I inquire as to this only, is it a law passed by the Local Legislature. ... I admit and I rejoice that there is an appeal from the power that made that law, But I will state to you where that appeal lies: THAT APPEAL IS FROM THE LEGISLATURE WHICH PASSED THE LAW TO THE PEOPLE WHO ELECTED THAT LEGISLATURE, and who can elect another to their minds.

Blake's arguments were echoed by his colleague David Mills, whom we saw in the chapter about federalism. For him, federalism meant the division of legislative responsibility between mutually exclusive spheres of power. Each government was supreme in its sphere and powerless beyond. Disallowance of legislation made by a province within its sphere was fundamentally opposed to these basic principles. In the Rivers and Streams debate, he believed that the Ontario Act was perfectly acceptable on the merits, but like Blake, made the institutional questions paramount: "It is not simply a matter of rivers and streams. It is not, as the Conservatives would fondly have the people believe, a matter of private rights or the compensation to be given therefor. It is something above and beyond both. It is the right of the province to enjoy the inestimable privilege of local self-government."

The issues at stake can be seen from two perspectives: federalism and rights. From the perspective of federalism, for McCarthy, the provinces were subordinate, to be supervised and regulated by the Dominion; for Blake and Mills, they were autonomous and coordinate governments. This difference encapsulated the struggle for about "provincial rights," and it was Blake's vision that emerged triumphant. From the perspective of rights, for McCarthy, legislatures could not be trusted to have the final say. Disallowance was a legitimate means of supervising the provincial legislatures and protecting individual rights, just as Imperial disallowance played the same supervisory role for the Dominion legislature. And courts might perform the same function. For Blake and Mills, the determination of the legislatures should be final. For the moment, we continue to consider rights - or, rights generally.

Doubtless McCarthy's beliefs more closely resemble the dominant beliefs now, more than a century later, but Blake's were the dominant ones in their time. My evidence for this conclusion, apart from Blake's stature itself, is threefold: the other discussions of rights in the late nineteenth century, the work of the courts, and the outcome of the struggle for "provincial rights." The next couple of items are the first two parts of the evidence, and they are, in effect, a long, long footnote.

A LONG, LONG FOOTNOTE: THE COURTS IN THE RIVERS AND STREAMS EPISODE, DRINK, SUNDAYS, AND ECONOMIC REGULATION

First, the courts and the Rivers and Streams fuss: The issue was one of statutory interpretation. An Ontario statute enacted in 1849 provided that loggers could use "all streams ... during the spring, summer, and autumn freshets." The question was, did "all streams" include streams that had been made usable by riparian owners? In 1863, the Court of Appeal had held that it did not, and the Vice-Chancellor Proudfoot relied on this holding in granting McLaren's claim for an injunction.

Caldwell appealed, and in July, 1882, a few months after the debate in Parliament, a divided Ontario Court of Appeal reversed. The majority, Spragge and Morrison, JJ., invoked a policy of encouraging the logging industry, which they saw expressed in the early nineteenth century statutes. Burton, J. dissenting, argued that a statue should not be interpreted to impair McLaren's private property, unless its language was "very plain." In November, 1883, a unanimous Supreme Court allowed an appeal by McLaren, primarily on the ground Burton, J. had used in the Court of Appeal: the presumption in favour of private rights. The Privy Council, which is of little interest to us in this study, reversed this decision a few months later, in April, 1884, with reasoning that was little more than an assertion about "the plain meaning of the words."

What attitudes towards rights are expressed in the Canadian judgments? Perhaps the choice at stake can be seen as one simply between the apparent public interest in logging and the private right. From this perspective, the majority of the Court of Appeal preferred the public interest, and the Supreme Court and Burton, J. preferred the private right. We prefer, though, another interpretation, which sees the court as more concerned about the appropriate functions of institutions. The preference for the private right was declaration that only the legislature must make a decision that impairs a private right. In the Supreme Courts, Ritchie, C.J.C. said,

... if the development of the public domain, the exigencies of the public, or the business of the country, is of such importance in comparison with individual loss or inconvenience as to require that private rights should give way to the public necessity, the remedy must be sought at the hands of the legislature through the instrumentality of expropriation, with suitable and full compensation under and by virtue of the right of eminent domain.

Note here the thought that "balancing" is a function for legislatures. As well, our interpretation has some negative support in the absence of any statements in the judgments of Burton, J.A. and the Supreme Court about dislike of interference with property.

Second, the other discussions of rights, and first, two crusades, one to make Sunday a day of rest, and the other to prohibit drink, although the term "episode" may not be entirely accurate, because both continued throughout our period. Because the major political figures did not often participate in these debates, the opinions of some minor figures emerge, and their thoughts did not differ substantially from their leaders. I see the same lesson in both episodes: rights were not a large element of the discussion, but when they were, lawyers (and everyone else) agreed explicitly that rights could be limited for the good of the public, and agreed implicitly that the legislature was the proper institution to make the decisions about the appropriate limits.

The crusade for prohibition, or temperance, began early in the nineteenth century, and by the late nineteenth century, both the Dominion and the provinces had enacted legislation enabling local governments to prohibit sales of liquor. The basis of the arguments for prohibition was the physical and moral health of the community, supported by statistics about costs of drink. The most common arguments to the contrary were that the restraints simply would not work, that violations would breed disrespect for the law, and (fearing the political costs of being pushed by a powerful single interest group) that the legislature should not proceed in advance of public opinion. The liberty of the individual to choose was asserted, although not often and not by a wide range of speakers. Whenever it was asserted, the response, explicit or implicit, was that liberty could by limited for the good of the community. Emerson Coatsworth, a lawyer from East York, recalling his reading of Blackstone, expressed this principle best: " If I remember Blackstone aright - it is some years since I read it - it states that liberty is not unlicensed freedom, not that every man may do exactly as he pleases, but that every man may have the measure of liberty which is consistent with the state of society in which we live."

The second crusade, to make Sunday a day of rest, was not as successful, at least during our period. The crusaders, primarily by a small group of Protestant members from Ontario, made essentially religious arguments during the late 1870s and early 1880s: Mortals had a duty to God to respect the Lord's Day. Opposing arguments were made by members who feared that uniform, national and compulsory sabbatarian restrictions would violate the religious liberty of those who interpreted the Fourth Commandment less strictly than the crusaders, and who believed that one did no dishonour to the Sabbath to pick up mail on the way home from mass.

These responses were based on individual freedoms, but they were transformed into a claim about federalism: Protestant Ontario was attempting to force its religious and cultural habits on Catholic Quebec. A Liberal member from Quebec, Guillaume Amyot, captured this sense and an entire vision of Confederation pithily: "When we joined Confederation, we joined it as a commercial partnership,

and not as a salvation army." As in the Rivers and Streams case, what began as an argument about individual rights ended as a claim for provincial rights. As the introductory note stated, the two themes of this chapter are interdependent.

During late 1880s, secular justifications emerged, and, in particular, a claim that a day of rest for workers must be secured. The crux of this claim was the need to limit the economic power of employers - and their liberty of contract - for the benefit of workers. This perception was not widely discussed, but it was strongly supported by a few lawyers, and most articulately by Henry O'Brien, a lawyer from Barrie, Ontario, a supporter of McCarthy's campaign for an English Canada, and later editor of the Canadian Law Times; The justifications for this sort of regulation were the public franchise of the railroads, and the vulnerability of their employees. O'Brien also argued strongly that prohibition limited liberty improperly, but he would have had no difficulty demonstrating that his two positions were not inconsistent. Prohibition did not involve a public franchise or a vulnerable group.

The other discussions of rights was in debates about what would now be called economic regulation: of conditions of work in factories, and regulation of railway rates and contracts. First, comes the factory legislation. Struggles by elite labour groups for better working conditions began in the mid nineteenth century, but for our purposes, the story of regulation of conditions of work begins in 1879, when Dr. Darby Bergin began a campaign to persuade Parliament to enact factory legislation. Lack of political will, together with uncertainties about the division of power, frustrated both his efforts and the efforts of labour organizations for the next few years. In the mid 1880s, the initiative shifted to Ontario, which enacted a Factories Act in 1884, regulating hours of work for women and children, and specifying safety requirements for machinery, although political maneuvering and continuing uncertainties about the division of powers delayed proclamation until late in 1886. Throughout, no significant claim was made that the legislature was not the appropriate institution to determine the limits on rights, even though there was some doubt about which legislature had jurisdiction - the Dominion or the provincial.

Next, regulation of the railways, which were the first massive concentration of corporate power in Canada. Complaints about both high rates for shipping goods and unfair terms appeared as early as the mid nineteenth century. Dalton McCarthy, who appears in so many different roles in our story, appears again here, as a champion of regulation. He introduced bills to create a commission to regulate rates several times during the 1880s, and each time his bills were blocked, largely by opposition from the railways and divisions among shippers. The government imposed a faint, ineffective measure in 1886, but a substantial regulation did not come until 1903. The railways argued that regulation was not necessary, and that it would frighten British investors, diminish revenues that already were inadequate, and curb their ability to respond to competition from

carriers in the United State. There was, though, no substantial argument that the legislature was not the appropriate institution to make the determination, and in particular, there was no substantial proposal to give the courts the job of setting or reviewing railway rates, a requirement that the Supreme Court imposed in the United States in 1890.

Another target of regulation was contracts for carriage of goods. In response to the notoriously unfair terms that railways had imposed on shippers by using their overwhelming bargaining power, legislation was enacted in 1871 to prohibit contracting out of liability for negligence. Its merits were not discussed in legislatures or periodicals, but it needs to be considered separately because its interpretation was often a problem for the courts. Their record was uneven, but they tended to respect its objective and interpret it liberally. For example, in *Grand Trunk Rwy v. Vogel,* William Ritchie C.J.C. said, "To limit the clause ... would ... entirely frustrate the intention of the legislature, or enable the companies to do so with impunity."

SOME CONCLUSIONS ABOUT RIGHTS AND LEGISLATURES

I have suggested that the crucial question is, who should make the determinations about limits on rights? The dominant answer given by the lawyers of this generation was, the legislature, particularly provincial legislatures. This answer makes these lawyers different from lawyers in the United States and in England, and makes as well a contrast to the Charter. Section 1 permits "reasonable" limits on rights, and it is the courts that determine the question of reasonableness. The courts are at the centre of the constitution and have the kind of role that McCarthy conceived, although the section 33(1) (the "notwithstanding" power) enables legislatures have the final word about some (albeit not all) of the rights.

Here are the considerations that seem to me to illuminate and explain this answer: the principle of legislative supremacy, a fear of executive power, the memory of the searing struggle for responsible government, the absence of the threat of redistribution, and federalism.

Legislative supremacy and loyalty to the British constitution are much of the explanation; Canada could hardly have established any different constitutional structure. And indeed, the Canadian lawyers had read Dicey. At this point, a reader may be tempted to interject a preemptive strike: this is the sole explanation, and if I do not stop here, I am in danger of making far too much fuss over a relatively simple issue. But the strike fails, for the Canadians spoke with a distinctive voice. Dicey, after all, celebrated courts, and the rule of law was for him very much rule by courts. Moreover, he said almost nothing about how rights might be related to federalism.

What distinguished Canadian and American approaches to rights in the late nineteenth century was less a commitment to individual rights than a difference in perspective concerning the threat to rights. For Canadian lawyers, the principal threat to individual liberty seemed to come not from tyrannical legislatures but from the arbitrary actions of unaccountable executive authority. Steeped in the British tradition, they took their lessons not from the democratic excesses associated with debt-relieving, paper money producing state legislatures, but from the executive abuses associated with the Stuart kings. The difference is crucial. Where in the United States protecting liberty required placing limits on the power of legislatures, in Canada protecting liberty meant fostering robust legislatures which would be able to constrain executive power. As Blake stated the principle: "In free Constitutions the Executive power must be guarded, limited and restrained, and must not be permitted to encroach on the rights of the people and the representatives. Executive power it is which has at all times been the great foe of liberty."

As long as executive power was understood to pose the greatest threat to individual liberty, legislative supremacy and responsible government were viewed

as a crucial part of the liberal constitutional solution. Only legislatures could be trusted to protect individual liberty for only there were decisions made by representatives "whom you elect and whom you can reject, whose proceedings take place in the light of day, whose speeches and votes you have the opportunity of judging." Indeed, for Blake and others, individual and political liberty were in an important sense mutually reinforcing. Making representative legislatures, rather than executives, responsible for all aspects of policy-making would ensure that individual liberty was respected. Conversely, making citizens alive to the responsibilities and opportunities of public deliberation would bring out the best in individuals and nurture "public virtue."

For the Canadians, the U.S. Constitution precisely demonstrated the dangers to liberty posed by executive dominance. As Blake said explicitly, "the name under which this power is exercised is wholly immaterial. Whether it be King, President or Cabinet which wields the executive power, the constant tendency of those possessed of such power, is to invade the domain of other branches of the Government and enlarge their own jurisdiction." David Mills was typically more circuitous, but he reached the same conclusion. "Under the American Constitution," Mills argued, "there has been an attempt made to protect the liberties of the people by making action of any kind, on the part of the state, as difficult as possible." The problem, he continued, was that power was thereby so fragmented that the public lost confidence in the ability of Congress to legislate at all - and this opened the door to "demagogues," which since the time of the Confederation Debates had served as a code word for ambitious presidential power.

But why did the Canadian lawyers remember the threat of tyrannical executives so long and so well, and why did they not reorient their thinking to respond to the threats to liberty from tyrannical legislatures? To find the answer, I turn to the remaining considerations: the memory of the searing struggle for responsible government, the absence of the threat of redistribution, and the preoccupation with issues of federalism.

Much of what was distinctive about the Canadians had been forged in light of the mythologized memory of the struggle for responsible government which had convulsed the Canadian colonies in the 1830s and 1840s. Blake spoke rhapsodically about his "earliest recollection," as a young boy, watching women make bullets for use in the Rebellion of 1837. Typically cautious, Blake argued that the insurrection was probably "ill advised," but he maintained strongly that no one could doubt "the substantial justice of the principles" that were at stake. The struggle was a searing one, and in the retellings, the people were perceived as a community represented in the legislature, struggling for liberty. And in Ontario, at least, this story became part of a larger story of Ontario's struggle for liberty from a series of external oppressors, Britain, Quebec, and last, the Dominion.

The next consideration, the absence of a threat of redistribution, can best be introduced by making an extended comparison to the United States. During the second half of the nineteenth century, the central problem of constitutional law in the United States was the limits of the power of the state to regulate economic activity. This problem was expressed as issues about rights and the permitted limitations on rights, and the general formulation was the same as it was in England and Canada: rights could be limited in the public interest. It was for the courts, though, to determine these limits, and their judgments are a famous or infamous battleground for competing interpretations.

The traditional explanations, originating in Progressive histories, are that the courts expressed laissez-faire ideology and supported the expansion of industrial capitalism. During the past fifteen or so years, this interpretation has been challenged, and continuity of thought throughout the nineteenth century has been stressed: the courts expressed, not laissez-faire ideology, but a fear of faction, private interest, and inequality that were deeply embedded in the United State's constitutional tradition. Although I must be diffident in offering our preferences, these reinterpretations seem persuasive. Nonetheless, running through all the interpretations is the horror of redistribution by legislatures.

This horror is the context for the Americans' fear of legislatures and faith in courts. The gulf between their fear and Blake's embrace was not so much that they gave different answers to the same questions as that they lived in a different world, with different questions. In Canada, economic regulation was not a major issue, and, more important, the regulation that was debated was not perceived as class conflict or as threatening redistribution. After all, the quarrel between McLaren and Caldwell may have been a quarrel about property, but it was also between two competing entrepreneurs.

This contrast is emphasized by remembering that the courts in the United States had already permitted the sorts of regulation contemplated in the Canadian debates about Sunday, prohibition, railways, and factories. Prohibiting work on Sundays, even to protect workers from the economic power of employers, was justified on public health grounds, not as a preference for labour over capital, and regulation of the railroads was justified because they had been granted a public franchise.

A sweeping conclusion is tempting: the Canadian lawyers were willing to entrust their property to the legislatures because they did not fear deep social and political divisions, and assumed that the legislatures would reflect their values about the proper limitations. A corollary, which I can call the "childhood thesis" is just as sweeping and just as tempting: as industrialization developed in Canada, more substantial social and political cleavages were perceived, together with threats of redistribution, and a heightened concern for judicial protection of individual rights was the result. Canadians eventually came to accept American ideas of rights and

rights protection - witness the Charter of Rights - it just took longer for them to grow up.

Caution, though, is needed in the face of temptation. The conclusion can obscure as well as illuminate, because, as we shall soon see, the distinctive beliefs we have described continued to prevail even in episodes which were deeply divisive, notably religion and language, and where passions and fears reached the same pitch as the Americans' debates about property. Thus the absence of political and social divisions alone was not the crucial reason for the differences in beliefs about rights. Nonetheless, the absence of the threat of redistribution is significant for explaining attitudes towards property, at least. Canadians had never viewed rights bearing individuals as vulnerable to the "ill humours" of an overbearing majority. Where the protection of property rights had been one of the triggers for constitutional reform in the United States, the debates surrounding the Confederation proposal in Canada (1864-1867) were virtually silent on the question of property rights. Property rights in late nineteenth century Canada lacked much of the symbolism they possessed in the United States. The ability (or right) to acquire property was, in the United States, a crucial badge of freedom; the right to acquire property, as Judith Shklar has observed, was a way of defining the difference between slavery and freedom. In Canada, on the other hand, property rights lacked much of this ideological baggage.

The "childhood thesis" is misleading in an additional way, because by concentrating on what was missing from the Canadian democratic experience and from Canadian rights consciousness, it fails to understand these lawyers on their own terms. The Canadian lawyers did not view the rights questions in terms of what they lacked or might become. For them, the legislative protection of rights was desirable because, in their view, this was the only way to realize liberty - in all its complexity. For them the legislative protection of rights was not a second best alternative; it was best suited to Canada and superior to American judicial review.

Icome now to the last consideration, and the most complex one, federalism, which was introduced in the discussion of the Rivers and Streams episode, and which has been in the background since then. We can best begin by returning to the struggle for responsible government, and introducing the principle of local control over local affairs. These two principles were so closely allied they became almost impossible to disentangle. The lesson of the 1830s and 1840s was that there were two great threats to liberty. One threat was posed by arbitrary executive rule; another came from rule by outsiders; and frequently the two were combined. Indeed, one of the reasons the veto power of disallowance became the huge constitutional issue it did is precisely because disallowance fused these two evils. From the perspective of Blake, Mills and others, disallowance was a constitutional evil both because the federal veto was a potentially limitless and arbitrary executive power and because it undermined the integrity of local legislatures. As

an aristocratic elite had joined forces with the Colonial Office in the 1830s and 1840s to stifle local democratic rule, so in the 1880s Prime Minister John A. Macdonald and his "Star Chamber" in Ottawa had exercised the veto power to undermine the integrity of the legislature (and thereby the people) of Ontario.

The experience of local control over local affairs made the claims for the provincial legislatures more than an empty claim for power. They were the appropriate legislatures to determine limits on rights, because their members would be closer to people and more sensitive to the rights of individuals than would a "foreign" official. Different groups that might clash and seek to oppress each other in a larger state were separated from each other, remaining as communities that shared basic understandings of their needs, communities that shared a common understanding of "good sense and right feeling."

(Ultimately, this belief depended upon an assumption that the division of powers in the B.N.A. Act gave the provinces extensive powers to legislate about individual rights. No one, though, expressed this assumption clearly, let alone considered it carefully, except, perhaps, David Mills. Throughout his speeches in Parliament he gave an expansive reading to the power of the provinces to legislate about "property and civil rights," and equated it to the "police power," which he derived from American sources, especially Cooley. For example, in arguing that Parliament did not have power to enact legislation about conditions of work in factories, he said, "All those regulations which a community find it necessary to make in order to prevent one man from interfering with the comfort and well-being of another in the use of that freedom which the law allows him, are police regulations, and are a part of that department of jurisprudence embraded with the division, designated - "Property and Civil Rights.")

Here, as well, was the justification for saying that the protection for a minority was, again, to involve itself in politics - to participate in the debate within the community. This understanding of federalism as a way of protecting individual rights and minorities was different than the understanding of American lawyers, who saw federalism as one of the ways of increasing the range of opportunities and institutions, to create checks and balances that would prevent the formation of an oppressive majority.

Implicit in these beliefs, although rarely discussed, was the possibility that rights might vary among the provinces. In contrast, the rights established by the Charter of Rights and Freedoms are uniform across the nation and support unity, although the override power preserves the possibility of variations, and the debate about Quebec's distinct society recreated the tension between autonomy and rights.

These ideals about the ways federalism protected individual rights were complicated, at best, and opposed, at worst, by a tendency for the struggles over provincial autonomy to obscure or pre-empt rights. We have already seen how the

debate about Ontario's autonomy obscured McLaren' right: the dominant question tended to be, shall the Dominion or Ontario make the determination, and the question whether the limitation tended to be obscured - or conflated with the issue of jurisdiction. Blake's claim about the provincial legislatures had enormous rhetorical power, but it was also deeply ambiguous in the sense that through it the protection of local self- government (or political liberty) tended to become a surrogate for the protection of individual rights.

This complication can be explored in the discussion of the remaining episode, the Manitoba Schools crisis. Here, Canadians were beset by the conflict and the passion that the Americans poured into questions about property. In Canada, Confederation separated the French and the English - the Roman Catholics and the Protestants - into separate provinces, to diminish the opportunities they would have to oppress each other. Yet differences of religion, language, and culture existed in each of the provinces. What protection was there for the minority? Some constitutional guarantees were offered, such as section 93 of the B.N.A. Act, but they were limited, as we shall see only too clearly.

RIGHTS AND FEDERALISM: THE MANITOBA SCHOOLS CRISIS

Before 1870, when the province of Manitoba was carved out of the territory acquired from the Hudson's Bay Company, there was no legislation about education. The only schools were private and denominational: the Roman Catholics and the Protestants each established and supported their own schools for their own children. In 1871, Manitoba enacted legislation establishing a provincial board divided into two sections, Protestant and Roman Catholic. Denominational schools could be established on the initiative of residents, and were supported by the residents and by provincial grants.

Two decades later, in 1890, this arrangement was terminated by the Department of Education Act, which transferred the existing schools to the government, and by the Public Schools Act, which established public schools supported by municipal and provincial taxes. These schools were avowedly "non-sectarian," although some religious instruction about "basic Christianity" was to be given. They were, of course, entirely opposed to the Roman Catholic beliefs about education. Attendance was not compulsory, and therefore Roman Catholics could establish different schools for their own children, but supporting these schools did not excuse payment of the taxes for the public schools.

What caused this dramatic change of policy has been much discussed by historians. The context included a provincial government struggling with political troubles, militant anti-Catholic fervor in Ontario, allegations about the inefficiency of the Roman Catholic schools, and massive shifts in population and schools, from rough equality in the early 1870s to overwhelming numbers of English-speakers and Protestant schools by the late 1880s. Arguably, the immediate spark was a speech by Dalton McCarthy in 1889 at the Portage La Prairie, in which he declared the goal "to make this a British country in fact as it is in name."

The struggle that followed seared the nation for almost a decade. So far as it was a constitutional issue, the fundamental text was section 22 of the Manitoba Act, which had the same purpose as section 93 of the B.N.A. Act - to protect schools established by minority religions. It gave the province authority to legislate about education, but subsection (1) protected any "right or privilege with respect to denominational schools" existing "by law or practice" at the Union. Subsection (2) permitted a Protestant or Roman Catholic minority to appeal to the Dominion cabinet if any "right or privilege" was affected by provincial authority, and subsection (3) provided that if a province violated subsection (1) or did not comply with an order made by the cabinet under subsection (2), Parliament could enact "remedial" legislation.

The Roman Catholics turned first to the courts, seeking to quash municipal by-laws that imposed the school taxes, on the ground that the 1890 legislation

violated the right or privilege given by subsection (1). In *City of Winnipeg v. Barrett*, the claim was dismissed by the trial court and the Manitoba Court of Appeal; the Supreme Court allowed an appeal, but in mid-1892 the Privy Council reversed and restored the judgment of the Manitoba courts: the legislation was valid. Next, the Roman Catholics sought relief under subsection (2), launching an appeal to the Dominion cabinet against the 1890 legislation. The government postponed making a decision by making a reference to determine its jurisdiction, with the result that the courts continued to be the primary focus of the struggle. In early 1894, in *Brophy v. A.G. Manitoba*, the Supreme Court held that the cabinet could not hear the appeal, but a year later, the Privy Council reversed it again: the cabinet was obligated to hear the appeal, and a government that was already floundering was obligated to hear the appeal.

The cabinet heard the appeal in March, 1895, a month after the Privy Council gave its decision, and ordered Manitoba to restore the Roman Catholic's schools. After Manitoba refused, a remedial bill was introduced early in 1896, debated during the late winter, and withdrawn by an exhausted and frustrated government in April. The schools issue was a major issue in the general election in June that brought the Conservative government to an end and brought the Liberals and Wilfrid Laurier to power. This dramatic episode can be considered from many different perspectives. With our interest in understandings of rights, we concentrate on the debate in Parliament on the remedial bill, and especially the debates about the sources of rights, and the relation between federalism and minorities.

Throughout the debate, one of major questions was whether the Roman Catholics had a right - a right to maintain their schools, and not pay taxes to support the public school system. In a moment, I will analyze the arguments about this right, but first, we will describe the lines that divided the members for and against its existence, and relate them to the lines that divided the support for and against the bill, and the divisions between the parties. We do this to make one crucial observation: the lines of division about the existence of the right did not coincide with the lines of division about the fate of the Bill. Nor did the lines of division about the fate of the Bill coincide precisely with the division between the Conservative government and the Liberal opposition, but this difference is not important to our analysis. All I need do is to separate it from the crucial observation.

The Conservative government's justification for the Bill was that a wrong had been done to the Roman Catholics in Manitoba, which the Parliament had a duty to remedy. Most of the Conservative members accepted this justification and supported the bill, and they were joined by a few Liberals, most of them from Quebec. All of these supporters, or at least those who spoke in any way that was relevant, argued or assumed that the right existed.

The Liberals opposed the Bill, and their response, unveiled by Laurier early in the debate, was complex and subtle. Faced by a government in disarray and the prospect of election in the near future, Laurier sought to accommodate a tension between his strong beliefs in provincial autonomy, and his own belief that a right had been violated, and sought to satisfy the outcry from Roman Catholics from Manitoba and Quebec. He argued that the appeal permitted by the Manitoba Act was a means for redress given to a minority, and redress was surely needed, but respect for provincial autonomy demanded delicacy and diplomacy. The Bill should be opposed, not so much for its content, but because the government, in its dealings with Manitoba, had failed miserably to give this respect. Most of the Liberals supported him in opposing the bill, and they were joined by a few renegade Conservatives, most of them from Ontario, driven to opposition by their antipathy towards separate schools.

In the words of one of the frustrated Conservative leaders, Laurier's strategy made a "vast umbrella" for the opposition, "under which they all gather and are protected from the pelting rain of criticism, ... but beneath which they all quarrel like cats and dogs." His frustration was understandable. The umbrella accommodated fundamental differences about the existence of the right. Some of the opponents argued or assumed that there was no right, but others, including Laurier himself, disagreed, and used the argument about diplomacy to combine opposition to the Bill and their belief in the right.

Having described the different patterns of support for the existence of the right and for the Bill, we can turn to an analysis of the arguments. The arguments for the existence of the right met an large obstacle at the threshold in *Barrett,* because the decision of the Privy Council flatly denied that the right was given by the Manitoba Act. Even though most lawyers believed that this holding was at least surprising, if not wrong, virtually all of them accepted it as an authoritative interpretation. Deprived of a source in a constitutional text, the argument was based on a claim that during the discussions preceding the Manitoba Act and the entry of Manitoba into Confederation, there was a commitment from the Canadian government, or a compact, that the Roman Catholic schools in Manitoba were to have constitutional protection from a Protestant majority. The argument continued by claiming that this compact created a moral right, which would also have been a legal right if the Manitoba Act had been properly drafted (or properly interpreted). It was nonetheless a right that Parliament was obligated to enforce. As well, some speakers derived the same right from the B.N.A. Act, or claimed that a commitment to respect the two cultures was made at Confederation. The most thoughtful expression of these arguments, was made by David Mills, and the fact that he was a Liberal and in opposition is a demonstration of the differences I have just described.

The arguments against the existence of a right, made by some Liberals and by the renegade Conservatives, began with the claim that there had been no compact

made about separate schools at Union, and none at Confederation - or, at least, none that reached to Manitoba, and that there was no general commitment to respect two cultures. We need not unravel the debate about the facts preceding Union, even though it was often fierce and had elements of an intriguing detective story. As well as being an argument about facts, the debate about compact was a debate about the sources of rights. The claim for the right was essentially that a community could make a solemn commitment about its conduct in the future - that it could create a right. In making this claim, though, the identity of the community and the conditions of the commitment were never clearly defined. Could the government of the day make the commitment? and what distinguished a compact from ordinary legislation? The impact of these questions was softened or obscured because the alleged compact was made as part of the making of a constitution - Manitoba's constitution, but the constitution was made by the British Parliament - and *Barrett* held that it did not include the right. The compact was fundamentally at odds with Parliamentary government, and although there was no clear resolution in this debate, the idea did not reappear. The sources of rights were, in the end, the common law and constitutional text, and the British Parliament was the maker of the text.

Shifting from the facts and compacts to texts, the opponents argued that the terms of the B.N.A. Act and the Manitoba Act simply did not give the right. In opposition to the claim about compacts and moral rights, they argued that the texts were authoritative, and context and moral rights were irrelevant. Here, they invoked powerful doctrine about statutory interpretation: the meaning of a text must be determined from its words. As well, these arguments about the text were supported by arguments about the function of Parliament: the assignment of the appeal to a legislature, not a court, implied that the function was to be political - the function was to consider the public interest and the good of the country.

Before we turn to the debates, I shall briefly describe the work of the courts in *Barrett* and *Brophy*. *Barrett* centred on the phrases "prejudicially affect" and "in practice" in subsection 22(1) of the Manitoba Act: did the Public Schools Act "prejudicially affect" a right or privilege that the Roman Catholics had, "in practice" before Union? The reasoning of the Canadian courts, both the Manitoba Court of Appeal and the Supreme court, was marked by a strong willingness to consider the context - the schools in Manitoba before Union and the politics at the time of the writing of the Manitoba Act. Depending upon these contexts, they shared a consensus that a privilege existed "in practice." The dividing issue was whether the obligation to pay municipal taxes "prejudicially affected" the protected privilege. Here, the Manitoba Court of Appeal concluded that it did not, and the Supreme Court reversed. The contrast suggests that the Manitoba court was determined to protect the power of the community to determine its own affairs, and the Supreme Court was more sensitive to the plight of the minority, and to the vision of Canada as a community of two cultures. The Privy Council

reversed the Supreme Court, but its reasoning was remarkably unpersuasive, if not incoherent.

The second of these two cases, *Brophy*, dealt with section 22(2), which gave the "Roman Catholic minority" an appeal to the cabinet from "any Act or decision of the legislature of the province or of any provincial authority." Their appeal was for relief from the 1890 legislation, and the major issue was about jurisdiction: did the section permit an appeal about legislation enacted after Union? A divided Supreme Court held that the appeal was limited to legislation enacted before Union. Most of the reasoning was muddled, making a marked contrast to the reasoning in *Barrett*, a contrast that may be a reflection of a general decline in the Court during this period. Again, the Privy Council reversed the Supreme Court. From the perspective of an interest in rights, the central fact is that the majority Supreme Court denied the minority the opportunity to present its appeal. Yet the significance of this fact is modest: the problem was much more difficult than the problem in *Barrett*, especially considering the waning of disallowance in the 1890s, a fact that the judges in Canada could hardly have not known.

Next come the statutory provisions, and after them, a set of excerpts from the debates about the Remedial Bill. Here are a few comments about the speeches: Foster wasn't a lawyer, but he did the best job of setting out the general arguments for the existence of a right. Laurier set out the Liberal strategy, and is worth reading just for the sake of reading one of the great speeches in our Parliamentary history (and I am always chastened to remember that he was speaking in his second language). Mills made the best analysis of the nature of Parliament's function, although he was a bit vague just why he thought there was a right. And skim the argument about the text of section 22. Here, Mills was seeking to avoid the force of the holding in *Barrett* by making the subsections deal with different kinds of schools. It was a good argument, but no one listened. McNeill and McCarthy argued that there was no right, and of the two, McCarthy seems to be the more powerful.

LEGAL THOUGHT IN THE 1920S AND 1930S

As we did in the first part, we begin with a look at lawyers' beliefs about law and legal reasoning. And here, we look primarily to the United States, simply because the changes began there - or at least appeared there in the most exuberant way.

The first two readings are surveys of the American story, and the next two are among the major articles written during the 1930s. Next comes a short account of developments in scholarship in Canada, and last, two readings from the 1930s, the first by W.P.M. Kennedy, and the second by C.A.W. (Caesar) Wright. Here are short accounts of each of them.

Kennedy is known to most historians as the author of a text on Canadian constitutional history, written in 1921, and which is now so old that most of them know him only through Carl Berger's book on the writing of Canadian history.[i] He is known to some lawyers as a dean of the University of Toronto law school, although for most of them, his reign is in a distant eccentric past, before "real" legal education began in Ontario when Caesar Wright succeeded him as dean.[ii] These impressions are at best incomplete. Kennedy was an impressive scholar, who left a large pile of books, articles and reviews. He gave extensive public service to Canada, his adopted homeland, and his vision of legal education remains an imaginative challenge to contemporary law schools, who pride themselves on their interdisciplinary prowess.

His early life stubbornly resists being revealed. Even the year of his birth is not clear, although it was likely 1879, in Wicklow, Ireland. He went to Trinity College, Dublin, studied English and History, and graduating with a B.A. in 1900. During the next decade he studied, perhaps in European centres, and wrote Tudor history, although how he supported himself is not clear. In 1913, he came to Canada, first to St. Francis Xavier College and then, after a year's stay, to the University of Toronto, where he remained for the rest of his career. Shortly after he came to Canada, he began to write about its constitutional history and constitutional law, especially federalism, at the same time continuing his Tudor scholarship. In 1930, he was appointed head of the law department, which was then an undergraduate programme. During the next decade and a half, he administered the law school through several transformations, and wrote extensively, primarily about Canadian life and politics, legal education, federalism, and administrative law. In 1949, he retired, to be succeeded by Caesar Wright, and died in 1963.

Wright was born in London, Ontario, in 1904, and after getting a degree from University of Western Ontario, went to Osgoode Hall, standing first in each year. After graduating, he did post-graduate work at Harvard, and returned to Osgoode in 1927 to teach. For the next two decades, he taught and wrote, doing much valuable scholarship, especially in torts. As well, he railed continuously against the curriculum of Osgoode and the Benchers's control over legal education. The climax of his long struggle was his resignation from Osgoode in 1947 and immediate and appointment as dean at the University of Toronto, to replace Kennedy, who had reached retirement age a year before.

The two had deeply different ideas about legal education, and Wright's campaign to establish his own programme effectively obscured Kennedy and his school for a long time.

One question that runs throughout this Part is, did Canada have a "realist movement." This questions threatens to distort, by asking whether Canada was (or was not) like the United States, and forgetting to consider it on its own terms. It is, though, useful if it is taken to mean, did the Canadian scholars undertake a substantial rethinking of their ways of thinking?

INTERPRETATION IN THE 1920S AND 1930S

Here, the material about interpretation in the late nineteenth century (Chapter 2) is the background. There are four readings, and here are some comments and questions about each.

Smith: This short note is the first appearance of distinctively new thought. Note that he does two things: i) He criticizes the Privy Council, something that Lefroy would not have thought of doing - the role of the scholar is changing, and ii) he calls for a new approach to interpretation.

How does his new approach differ from late nineteenth century beliefs? What does he say is the major or basic job of the court? Does this job require thinking about the needs of Canada in the 20thC?

He argues that the courts should be willing to look at Parliamentary debates and similar kinds of materials. In retrospect, the change he was asking for may not seem a fundamental one, yet for one reason or another, this issue became a lightning rod, and lots of other scholars made the same plea during the next decade. Why was it so important to them? What was at stake except a small corner of doctrine about sources?

Allen: This is an exmple of mainstream approaches.

Corry: The major changes began in the early 1930s, and this article is a major statement of the mainstream position (which remained the mainstream until the past couple of decades).

What, for Corry, is the basic job? What reasons does he give for rejecting the late nineteenth century beliefs? What is the significance of the statutory text? Do judges have a choice? If they do, why are they not despots? That is, how does he solve the problem of law/politics?

Willis: Willis is a powerful thinker indeed, and this is perhaps the best-known Canadian periodical article. There are, though, a couple of ironies. First, it isn't, despite its fame, a mainstream argument, and it is much better-known than Corry's, which is the mainstream one. Second, I'm sure you will agree that it is not as good as his "Three Approaches" (which we read later) which isn't nearly as well-known.

What is Willis' message? What for him is the significance of the text? Do judges have a choice? What does he tell us about what judges should do? What is his message about law/politics? What does he mean by saying that the presumptions are a "common law Bill of Rights" and "fourteenth amendment to the British North America Act"?

FEDERALISM IN THE 1920S AND 1930S

The Work of The Courts

In the early twentieth century, Lord Haldane replaced Watson as the dominant figure in the Privy Council, and a new generation of judges, led by Sir L.P. Duff, appeared in the Supreme Court. By late 1920s, the Dominion's powers seemed to Canadian observers be a pale image of what had been contemplated at Confederation and what the B.N.A. Act had given it: pogg was a minor, supplementary power, to be used only in emergencies; s. 91-2 was severely restricted; and s. 92-13 seemed to be the dominant power.

Although several cases decided between 1910 and 1920 suggested some of the trends and doctrines, the major cases were decided in the early 1920s. The first was *the Board of Commerce Reference*. Here, Haldane limited s. 91-2 by saying that it did not permit regulation of "a particular trade in which Canadians would otherwise be free to engage in the provinces," thereby extending the doctrine in *Parsons* about regulating terms of contracts of a trade to regulating an entire trade. As well, he added a comment that could be read as making s. 91-2 no more than a supplement to pogg, and said that s. 91-27 was confined to matters that were, in their "very nature" criminal. Coming to pogg, he announced the limitation for which he became notorious in Canada: if legislation also affected property and civil rights, pogg could be used only in "exceptional" or "special circumstances such as a great war." A little less than two years later, *in Fort Frances Pulp and Power v. Manitoba Free Press*, he added the phrases "sudden danger to the social order" and "emergency," and in *Toronto Electric Commissioners v. Snider*, he spoke of "some extra-ordinary peril to the national life of Canada. As well, Haldane explained *Russell* which he had been at pains to narrow throughout, by saying that drink had been a "menace to the national life of Canada," and the Dominion prohibition had been designed "to protect the nation from disaster." The "national concern" was either forgotten or collapsed into an emergency.

Early in this period, the Supreme Court was divided, but at the end, Duff was dominant, and some of his decisions, rather than being entirely determined by the authority of the Privy Council, anticipated some of its more extreme holdings. Both Duff and Haldane seemed unwilling to contemplate the possibility that a particular episode or a collection of particular episodes could have some general or national dimension. The capacity of the provinces to legislate, typically through s. 92-13, was alone sufficient to exclude the Dominion.

Early in the 1930s, the Privy Council decided three cases, all involving challenges to Dominion legislation, that seemed to Canadian observers to signal a shift in both the results and the manner of reasoning in cases about the division of legislative powers. In the first, *Proprietary Articles Trade Association v. A.G. Canada*, Atkin gave s. 91-27 an expansive reading, and said that Haldane could not have meant what he said in the *Board of Commerce Reference* about acts in "their very nature" criminal. As well, he went out of his way to disavow Haldane's suggestion that s. 91-2 was merely a supplementary power.

Two more cases, the *Aeronautics Reference* and the *Radio Communication Reference* involved, for the first time in any substantial way, the Dominion's power to implement treaty obligations. Section 132 seemed from its terms to be limited to treaties binding Canada as part of the British Empire, but Sankey suggested that it also gave the Dominion power to make legislation to implement treaties it made as an independent nation. As well, he made some comments that seemed to give general support to the Dominion. He spoke of its "high functions and almost sovereign powers," and seemed to suggest that the "national concern" could support legislation to implement treaties.

During the mid 1930s, the central constitutional issue was the fate of Prime Minister W.H. Bennett's New Deal. Early in 1935, Bennett promised Canadians a grand legislative programme to escape from the depression, to rescue the capitalist economic order - and to save his floundering government. A few months later, his programme was enacted in six statutes, which fell far short of his promises, and which failed save him from the electors. MacKenzie King and the Liberals came to power in the general election of 1935, and King quickly referred all six statutes to the Supreme Court, together with two others that had been enacted by Bennett's government in 1934. After the courts had pronounced most of them invalid, some scholars said that the outcomes had been predictable or inevitable, but during 1935 and 1936, the outcome was not so clear. In 1936, several competent writers made sustained arguments for validity, relying on either pogg or 91-2, and MacDonald, who was probably the most competent gave his cautious opinion that there was a "reasonable possibility" of validity.

The Supreme Court pronounced most of the programme invalid, and so did the Privy Council, although the results for a few of the statutes differed. There were two major issues or groups of cases. One concerned treaties: three of the statutes that been enacted to fulfill treaty obligations about working conditions undertaken by the Dominion for Canada as an independent nation. Because they seemed clearly to regulate subjects within s. 92, they could be valid only if the Dominion had a distinctive power to implement treaties. The Supreme Court divided three to three, and the Privy Council concluded they were invalid. Atkin said that s. 132 was limited to treaties binding Canada as part of the British Empire, and that there was no other power to legislate about treaties. He rejected the appeal to the Aeronautics Reference and the Radio Reference by limiting them to their narrowest grounds, or, less charitably, by misreading them.

The other major issue was economic regulation, and the fate of the Natural Products Marketing Act, enacted in 1934. It was designed to support producers of natural products, and expressly limited to products for which the principal market was outside the province of production, and products that were, in some part, exported. Speaking through Duff, the Supreme Court unanimously held it ultra vires, and the Privy Council affirmed, saying that it was "unnecessary to add anything." It was hardly surprising that the Privy Council was so magnanimous; Duff's judgment sought to do no more than synthesize its decisions thoroughly and faithfully, although his readings tended to be ungenerous to the Dominion at every turn, contrasted, for example, to some of the scholarly writing in the mid-1930s. For s. 91-2, he was unwilling to contemplate the possibility of a general regulation of

trade or an expansive use of the necessarily incidental doctrine. For pogg, he began with a narrow analysis of Watson's language in the Local Prohibition Reference: not all matters that affected "the body politic of the Dominion" or that were of "national concern" were within the Dominion's reach, but only "some" of them. After a thorough account of the cases, he offered little to determine what these "some" were, except to repeat the warning that "great caution" was needed for such a "delicate and difficult task." Atkin was pleased enough to hope that this would become "the locus classicus of the law on this point."

Note: Constitutional Scholarship

From 1900 until the mid 1920s, almost all the writing continued to be done by practising lawyers, the only conspicuous academic being Lefroy, who became a professor at the University of Toronto in 1900. And almost all of their writing was articles in the legal periodicals analyzing particular decisions of the Supreme Court or the Privy Council. The understandings of legal reasoning and the job of a scholar continued to be the understandings that were dominant in the late nineteenth century.

Understandings about legal reasoning and scholarship changed dramatically in the mid-1920s, and the occasion for declaring the change was the Snidercase, especially Haldane's comments about Russell. In 1926, H.A. Smith, a young Englishman teaching at McGill, wrote two articles that presented both a sustained criticism of the Privy Council and a different mode of scholarship.

Smith returned to England in 1929, and three other writers were dominant during the 1930s. The most prolific was W.P.M. Kennedy, whom we saw in the last Chapter. The second was Vincent MacDonald, who joined the Faculty of Law at Dalhousie University after ten years of varied practice, and became dean in 1934. The third was Frank Scott, who was a member of the Faculty of Law at McGill, and as well, a major Canadian poet, a founder of the C.C.F., and a crusader for civil liberties. All three were, obviously, academics, and from this time onwards, practitioners contributed a smaller and smaller portion of the writing.

Suggestions and Questions For Discussion

There are three questions that can be asked about all three scholars: i) what were their understandings about interpretation? ii) what were their understandings about the role of a scholar? and iii) what was their vision of Canada, Confederation, and the B.N.A

THE CANADIAN BAR REVIEW'S SYMPOSIUM

When the Privy Council decisions about the New Deal cases were announced. The editor of the Canadian Bar Review arranged a symposium, edited by Kennedy, and his Introduction and Scott's contribution are good examples of the widespread despair. [W.P.M. Kennedy, "The British North America Act: Past and Future" (1937) 15 Can. Bar Rev. 393, and F.R. Scott, "The Consequences of the Privy Council Decisions" (1937) 15 Can. Bar Rev. 485.] Kennedy said,

> We must no longer live in the vain world of delusion that the Judicial Committee will do for the Act what the Supreme Court of the United States has been able to do, in a wide manner, since the days of John Marshall, for perhaps the most rigid formal constitution in the world.... As we read the recent judgments we must be convinced that the Judicial Committee has no intention whatever, in any substantial or fundamental matter, of acting as a constituent assembly for Canada. We would have faced this issue long ago had we not too largely believed that constitutional and legal wisdom never really crossed the Atlantic.
>
> For, I submit, we must now face issues. The federal "general power" is gone with the winds. It can be relied on at the best when the nation is intoxicated with alcohol, at worst when the nation is intoxicated with war; but in times of sober poverty, sober financial chaos, sober unemployment, sober exploitation, it cannot be used, for these, though in fact national in the totality of their incidents, must not be allowed to leave their legal water-tight provincial compartments; the social lines must not obliterate the legal lines of jurisdiction—at least this is the law, and it killeth....
>
> The time has come to abandon tinkering with or twisting the British North America Act—a curiosity belonging to an older age. At long last we can criticize it, as the stern demands of economic pressure have bitten into the bastard loyalty which gave to it the doubtful devotion of primitive ancestor worship. We must seek machinery to do in Canada certain things: (i) to repeal the B.N.A. Act *in toto;* (ii) to rewrite completely the constitution; (iii) to provide reasonable and sane and workable constituent machinery; (iv) to abolish all appeals to the Judicial Committee. I submit that every one of these things is necessary; and above all we must get rid of all the past decisions of the Judicial Committee, for they will hang round the necks of the judiciary, if appeals are abolished, in that uncanny stranglehold with which *stare decisis* seems doomed to rob the law of creative vitality.

Scott was equally passionate, and his article concluded in this way:

> Turning from the legal to the economic consequences of the decisions, it is obvious that they leave this country even more helpless than she was in 1929 to deal with the problems created by a changing economic system. The depression came, revealing gross injustices and inefficiencies in the body economic; the Stevens Committee and the Royal Commission on Price Spreads disclosed evils crying out for remedy; a considerable attempt was made to provide a system of controls and palliatives on a national scale. This attempt has failed because the constitution could not, in the hands of the judiciary at the moment interpreting it, adapt itself to the new requirements....
>
> If the whole trend of world developments is wrong and all government interference in economic matters is an obstacle to progress, then Canada will benefit from her constitutional impasse, but should the reverse be true, should the need of the hour be increasingly to bring an intelligent and conscious direction to economic affairs, then Canada has suffered a national set-back of grievous proportions. A federal government that cannot concern itself with questions of wages and hours and unemployment in industry, whose attempts at the regulation of trade and commerce are consistently thwarted, which has no power to join its sister nations in the establishment of world

living standards, and which cannot even feel on sure ground when by some political miracle it is supported in a legislative scheme by all the provinces, is a government wholly unable to direct and to control our economic development.

The history of recent cases dealing with the control of trade and commerce in Canada shows a fairly consistent attitude in the courts against control, an attitude which overrides any feeling for or against provincial autonomy....

It would seem that even without special mention in the British North America Act, the doctrines of *laissez-faire* are in practice receiving ample protection from the courts....

One lesson, it is to be hoped, will be learned again from these decisions. The Privy Council is our final court of appeal. Its interpretations of the Canadian constitution vitally affect the political, social and economic destinies of eleven million Canadians. Such a court should be staffed with men fully qualified to understand the spirit which infuses the British North America Act, and the environment in which it must be made to work. Unfortunately it is only too evident that judges of this type rarely sit upon the Judicial Committee....

To imagine that we shall ever get consistent and reasonable judgments from such a casually selected and untrained court is merely silly. To continue using it under the circumstances is costly sentimentality.... No alterations to the British North America Act will ever achieve what Canadians want them to achieve if their interpretation is left to a non-Canadian judiciary.

THE O'CONNOR REPORT

The second example of outrage was the O'Connor Report, which was a report made in 1939 to the Senate by W.F. O'Connor. At the time, he was the Senate's clerk and counsel, but earlier he had been a member of the Board of Commerce and had represented it before the Supreme Court and the Privy Council. Throughout almost 150 pages of his report, he vented anger and frustration. After quoting extensively from the discussions preceding Confederation, he turned to an analysis of the structure of ss. 91 and 92. The basic principle was a division between general and local matters: s. 91 assigned power to the Dominion to legislate about general matters, and s. 92 assigned power to the provinces to legislate about local matters. This interpretation was supported by a thorough analysis of the various components of ss. 91 and 92: the enumerated subjects in s. 92, the opening words of s. 91, the enumerated subjects in s. 91, the "notwithstanding" clause, the "deeming" clause, and s. 92-16.

O'Connor claimed that the careful design of the B.N.A. Act had been "repealed by judicial legislation." The Privy Council had been guilty of "demonstrable error" and "serious and persistent deviation," and it had "tortured" crucial words in the Act "in violation of their clear grammatical sense as well as their purpose." Its path of error began as early as Parsons, and a stray comment about the concluding words of s. 91. *Russell v. The Queen* represented a proper understanding of this structure, but error returned in 1890s, and continued in Watson's "extraordinary" decision in the *Local Prohibition Reference*, which struck s. 91 "the deadliest blow it has received." The opening grant of power in s. 91, its sole grant of power, was divided from the enumerations and limited to "extraordinary circumstances only, and without exclusiveness or paramountcy." This interpretation,

> paralyzed many essential law-making activities of the Dominion. ...If only this fatal error in construction could be undone, nothing much need be done in order to restore the B.N.A. Act to that state of reasonable satisfactoriness in which it was before the fatal error was committed.

Instead, the result was "an undeniable partial breakdown of the general scheme of Confederation." During the twentieth century, Haldane's decisions "exceeded those of Watson in their emasculatory effect upon the Dominion's authority." "Villains" may be too mild a word to capture O'Connor's opinion of Watson and Haldane.

Earlier, writers in the late nineteenth century had also undertaken analyses of the structure of ss. 91 and 92, although not at nearly such length. Some of them, like O'Connor, believed that the central principle was the division between general and local matters, although they did not share his belief that the division was an expression of a design for a strong Dominion, and they supported the claims of the provinces instead. O'Connor's analysis shaped debate for two or three decades afterwards. Even though he demonstrated a faith in words, grammar, and punctuation that was deeply at odds with the new ideas

about interpretation, scholars tended to make their arguments in his terms, perhaps because his conclusions were so appealing to most of them.

THE ADMINISTRATIVE STATE IN THE 1920S AND 1930S

As an introduction to the 1930s, we return to the late nineteenth century - and to Dicey. It seems to me that in these two readings, Dicey is trying to accommodate his general constitutional beliefs, especially his beliefs about the rule of law, and the administrative state. The result (especially the 1915 note) is an expression of the structure of administrative law for most of the 20thC. (Those who have taken or are taking administrative law will see judicial review, jurisdiction, error of law, and procedural fairness.)

The next reading is from Hewart's New Despotism. He was an English judge, and his book was a valiant effort to protest the rise of bureaucracy and to affirm Dicey's values. His protests against the destruction of Parliamentary sovereignty and the rule of law are, in part, protests against "privative clauses," that is, terms in statutes that bar review by courts. In particular, he protested against provisions in grants of power to make "delegated legislation," or regulations, that said, in effect, "whatever courts might otherwise think, the regulations made under this power shall be considered as though they really were made within the terms of the power. That is, review for ultra vires is forbidden." Just before Hewart wrote, some courts in England had done what these provisions seemed to the casual reader to require - backed off.

Loughlin is a survey of developments in the early twentieth century, and the reading from Landis, who was one of the great scholars of the 1930s in the United States, gives some sense of the thinking there. The rest of the readings are by (or aimed at) John Willis. What is his attitude towards the administrative state, especially about the role of agencies and courts?

CONSTITUTIONAL SCHOLARSHIP IN THE 1950S AND 1960S

The protagonists who dominated the 1930s, Kennedy, MacDonald and Scott continued to write in the 1940s and 1950s, in substantially the same way and with substantially the same conclusions, although all of them incorporated O'Connor's analysis of the cases, and therefore tended to see Watson as the villain more than they had in the 1930s. They were followed by younger scholars, especially Bora Laskin, of the University of Toronto, and William Lederman,~_ Queen's. r

The first item that follows this note is Laskin's article about POGG, which is probably the best-knourn writing of the period. Here, he began by by declaring that P.O.G.G. was the sole grant of power to the Dominion,; that the enumerations were merely examples; and that the Privy Council had severed them and made P.O.G.G. into a residuary clause - with a trivial scope. The bulk of the article was a comprehensive and searing indictment of its judgments, especially of the work of Duff and Haldane. Laskin spared Watson from the brunt of the indictment, arguing that even though the decision in the *Local Prohibition Reference* was muddled, it did permit accommodation of the "social economic development of Canada," through recognition of different and changing aspects. But Haldane's creation of the emergency doctrine was the work of a constitutional Houdini whose magic was "strong enough to make [P.O.G.G.] disappear altogether and to make it reappear as a spirit." The judgment in *Snider* was "almost shocking in its casualness," and a product of, inflexible concepts that are often the product of a neat mind, often unwilling in the interests of some sort of formal logic to discourage thought patterns that had been nicely fitted together.

Duff's judgment in the *Natural Products Marketing Act Reference* failed to understand the *Local Prohibition Reference,* and amounted to no more than a *"circulus inextricabilis."* Again and again, as he went through the cases, Laskin demonstrated the series of woeful errors: inconsistencies, failures to explain, sheer inventions of doctrine, departures from the meaning of the *B.N.A. Act* apparent to "any careful reading", and a preoccupation with subjects of legislation, not aspects. He did not discuss the understandings at Confederation, the changes in the social and economic context or the nature of contemporary Canada and its needs, but throughout, there ran a strong feeling that these the decisions were not only poorly crafted, but inappropriate for Canada. He concluded with a hope for change and for better work from an independent Supreme Court.

A few years later, in 1951, writing about the Supreme Court as the final court of appeal, Laskin undertook the first substantial discussion of its work since Lefroy's text in the late nineteenth century. Here, he saw the early cases as faithful to the *B.N.A. Act,* the contributions of Duff to the eventual catastrophe, and the slow loss of independence and initiative to the Privy Council. Ten years later, much the same story as Laskin told for P.O.G.G. was told by Alexander Smith for the trade and commerce power, in his book, The Commerce Power in Canada and the United States. He traced its erosion from *Parsons* to the *Natural Products Marketing Reference* with less passion than Laskin, but thoroughly and with great care, and he, too, included the Supreme Court decisions at length.

Competing assessments of the Privy Council began to appear in the 1950s, first in Quebec among civilians, and then in a younger generation of common law scholars, of whom the first was William Lederman. In a series of articles beginning in 1965, he argued that at the heart of Canada was a balanced federalism: a balance between unity and diversity, and between a strong Dominion and autonomous provinces. The "equilibrium points" of this balanced federalism had been developed painstakingly by the courts, especially the Privy Council, using two techniques. First, the larger and more expansive powers in the *B.N.A. Act,* especially P.O.G.G., had been integrated with each other and limited. Lederman accepted the reading of s. 91 that made its enumerations independent grants of powers, and P.O.G.G. a residue of the powers not enumerated in either s. 92 or s. 91, arguing that this reading was as consistent with the text as any other reading (and here, presumably, he meant the readings that saw a grant of two powers, over general and local matters) and more appropriate for Canada. The crucial question was, when should new functions of government be recognized as new aspects? For Lederman, the best answer had been given by Watson, "the greatest of the Privy Council judges concerned with the Canadian constitution," in his speech in the *Local Prohibition* Reference. The villain of the 1930s was now a hero, and even Haldane was given modest approval.

The second way the courts had made balanced federalism was based on Lederman's perception that the powers in ss. 91 and 92 overlapped extensively and pervasively. This perception was not, by then, unusual; most modern scholars had either proclaimed it or would have accepted it, but Lederman made it a central theme. The courts chose between the overlapping powers (through determination of pith and substance) or recognized concurrent powers, and Lederman saw a tendency to more and more concurrency as well as balance. His reading of the cases, especially his perception of balance, paralleled shifts in federalism that emerged during the 1950s and 1960s: the need for coordination resulting from expansion of governmental programmed, and decentralization resulting from the ambitions of the provinces.

Most scholars in the 1950s and 1960s shared beliefs about legal reasoning, especially interpretation, which were essentially a continuation of the approaches that emerged in the late 1920s and 1930s: Statutory and constitutional texts alone did not determine outcomes, at least not in hard cases. Because the meanings of words were, at least at the edges, indefinite, judges made choices. To pretend otherwise was to mask the choices with barren "logic" and "abstract reasoning." Yet the choices were not personal or political; instead, interpretation was a distinctive, rational process. The judge must be faithful to the purpose of the text, taking into account its context and the values and needs of the contemporary society.

They beliefs were rarely elaborated in any rigorous or sustained way, and varied from scholar to scholar, but Laskin and Lederman were good examples of both the common ground and the diversity. In his reconsideration of P.O.G.G., Laskin condemned the Privy Council's "cold abstract logic" and "rigid abstractions", and its failure to take account of "the social and factual considerations" in the New Deal legislation, and the future of "our society and its contemporary problems." Yet, for Laskin, critical analysis of doctrine was central, and his criticisms of the reasoning of the past were not expanded into explanations of how judges might do their work better. He did not, for example, explain the tension between respect for the *B.N.A. Act* (implicit in the argument that some Privy Council interpretations were contrary to "any careful reading")

and the need to take account of current needs and problems, or explain how judges should determine current values.

Even though Lederman's assessment of the results of the cases was different, he shared much of Laskin's beliefs about interpretation, especially the responsibility of judges to respond to current social conditions and needs. He claimed that the *B.N.A. Act* was "ambiguous or incomplete" and therefore any debate whether the Privy Council had betrayed its terms was meaningless. "I do not think the Judicial Committee should be disparaged for having failed to find answers in the text of the *B.N.A. Act* that were not there to be found." The real issue was the need to escape from literal interpretation - the futile faith in the-meanings of words that the Privy Council had too often displayed, and to undertake "sociological" interpretation - a care for the "ongoing life of the country." Because the words of a text alone could not give answers, they must be "related to the cultural, social and economic realities of the society for which they were and are intended." In making their choices among overlapping powers, judges should weigh "the relative values of uniformity and regional diversity, ...the relative merits of local versus central administration, and the justice of minority claims," and seek to implement "widely prevailing beliefs." The crucial question was, "is it better for the people that this thing be done on a national level or on a provincial level?"

The contrast to Lefroy's beliefs about interpretation and the structure of powers is large and obvious. One illustration is embedded in Lederman's word "balance." His vision of federalism as a balance between the Dominion and the provinces merged with balancing as a way of reasoning. Lefroy's belief that courts determined the sharp, bright lines between mutually exclusive spheres of absolute power, without consideration of context or need, was replaced by a belief that courts balanced overlapping and competing claims. Here again is the jurisprudence of cooperative federalism. And Lefroy's fear of the implications of the inquiry into "national concern" turned out to be prescient. In explaining why aeronautics was justifiably a "national concern," Lederman said that it did not "imply large scale trespass" on provincial powers, and did not take over "great portions." Such questions of degree were just the kinds of questions that Lefroy had feared.

A contrast to the scholars in the 1920s and 1930s is not as obvious or great as the contrast to Lefroy, but it exists nonetheless. The scholars in the 1950s and 1960s seem to be more distant from the issues swirling about them than the scholars in the 1920s and 1930s, and to be less passionate, or, to be more precise, less openly passionate about the outcomes. For example, Laskin's article on P.O.G.G. was powerful and passionate, but despite his personal belief in the need for a strong Dominion, the power and the passion seem directed at the inadequacies of legal reasoning and not the betrayal of Canada. Neither he nor Lederman sought expressly to explain the decisions of the Privy Council by invoking social, economic or political beliefs in any sustained way, or talked much about contemporary conditions and issues. Instead, they emphasized judicial techniques, especially approaches to interpretation.

This contrast may reflect differences in legal education and scholarship.~In the few decades after World War Two, law schools in Canada contained two approaches to teaching and thinking, which mingled but which were never synthesized. The first was a modified continuation of the way of thinking established in the late nineteenth century, which, unlike its fate in the United

States, continued to be powerful in Canada. It was not, though, the approach of Laskin and Lederman. The second was a tamed version of the ferment of the 1920s and 1930s. The dangerous political edges were shorn away, and lawyers and legal scholars were perceived as professionals, skilled in the workings of the legal processes and in implementing society's preferences, which were typically perceived to be unproblematic and widely shared. This approach was originated in the United States, and Canadian legal scholars in the 1950s and 1960s were much more shaped by thinking in the United States than their predecessors were in the 1930s. Perhaps the difference between the 1930s, and the 1950s and 1960s is best expressed in the word "tamed:" the political passions of Kennedy, MacDonald, and Scott were tamed, or muffled.